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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5704

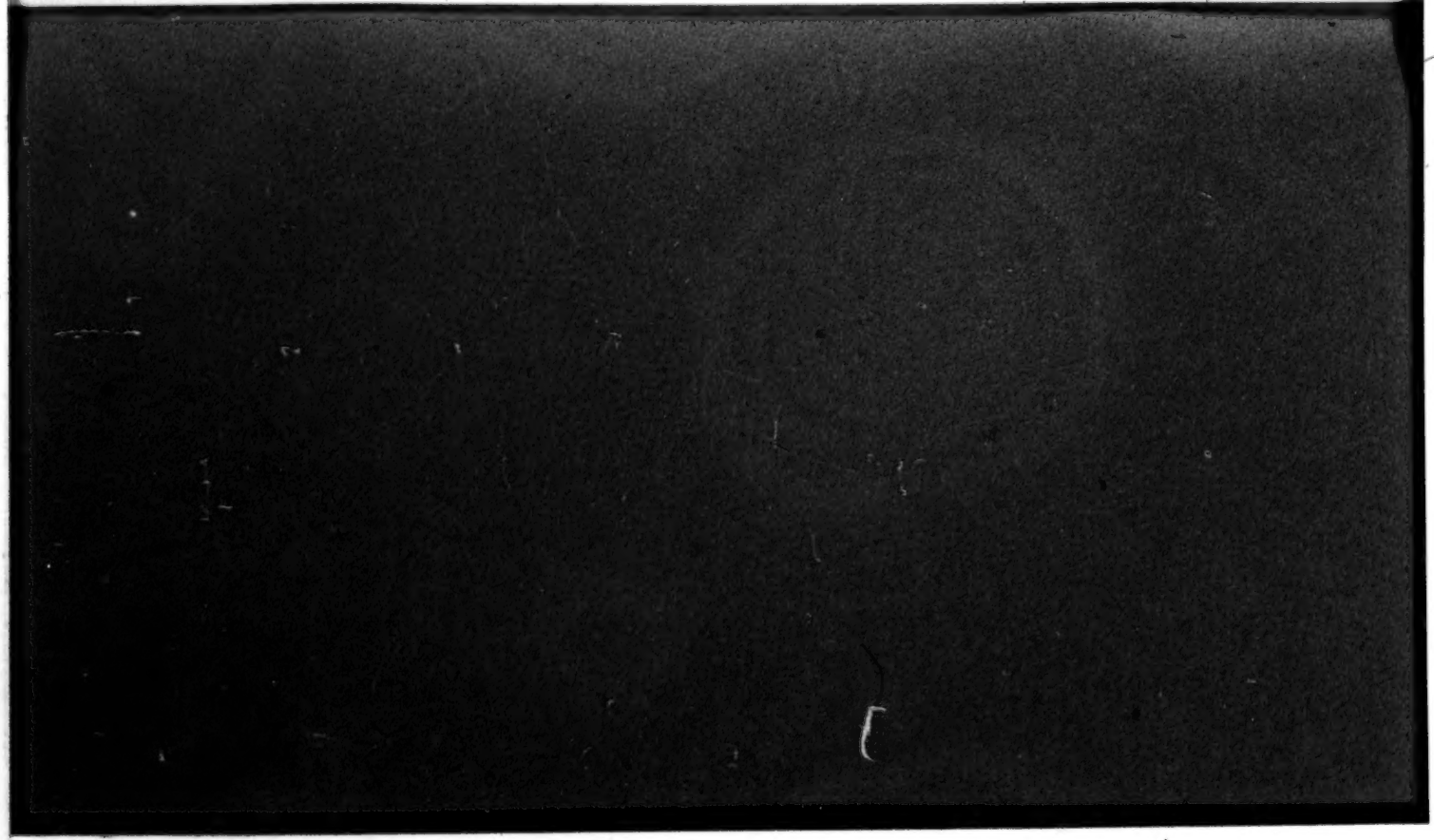
JEAN CHRISTIAN and VICTOR L. GREEN,
Appellants,

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT; its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, PETER J. BRENNAN; UNITED STATES POSTAL SERVICE CORPORATION; its Postmaster General, ELMER T. KLASSEN; UNITED STATES CIVIL SERVICE COMMISSION; its Chairman, ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, GEORGE P. SHULTZ,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 14, 1972
PROBABLE JURISDICTION NOTED APRIL 16, 1973



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Civil Docket

UNITED STATES DISTRICT COURT

71 Civ. 5556

Dec. 21, 1971:	Filed Complaint—Class Action.
Dec. 21, 1971:	Filed Order Appointing Process Server (Clerk of Court).
Dec. 21, 1971:	Filed Order to Proceed In Forma Pauperis (Croake, D. J.).
Mar. 10, 1972:	Filed Amended Complaint—Class Action.
Mar. 10, 1972:	Filed Order Appointing Process Server (Clerk of Court).
Mar. 22, 1972:	Filed Plaintiffs' Notice of Motion for a Determination of the Class.
Mar. 22, 1972:	Filed Memorandum of Law in Support of Plaintiffs' Motion for a Determination of the Class.
Mar. 28, 1972:	Filed Answer of Federal Defendants Department of Labor, James D. Hodgson, Postal Service Corporation, Elmer T. Klassen, Civil Service Commission, Robert E. Hampton, James E. Johnson, and Jayne Spain to Plaintiffs' Amended Complaint.
Apr. 10, 1972:	Filed Answer of State Defendants New York State Department of Labor and Louis L. Levine to Plaintiffs' Amended Complaint.
Apr. 17, 1972:	Filed Plaintiffs' Notice of Motion for Summary Judgment or for a Three-Judge Court and Summary Judgment, with attached Statement of Material Facts as to which Plaintiffs Contend There is no Genuine Issue to be Tried.

Relevant Docket Entries

Apr. 17, 1972:	Filed Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment or for a Three-Judge Court and Summary Judgment.
May 12, 1972:	Filed Federal Defendants' Notice of Motion to Dismiss or for Summary Judgment, with attached Statement of Material Facts as to which the Federal Defendants Contend There is no Genuine Issue to be Tried.
May 12, 1972:	Filed Memorandum of Law in Support of Federal Defendants' Motion to Dismiss or for Summary Judgment.
May 16, 1972:	Filed Answer of Federal Defendants Department of the Treasury and John Connally to Plaintiffs' Amended Complaint.
May 18, 1972:	Filed Memorandum for State Defendants.
May 19, 1972:	Filed Plaintiffs' Reply Brief.
May 24, 1972:	Filed Order Designating Paul R. Hays, C. J., and Arnold Bauman, D. J., in addition to Marvin E. Frankel, D. J., to sit as Three-Judge Court (Friendly, C. J.).
May 24, 1972:	Filed Order Setting Hearing Date Before Three-Judge Court (Frankel, D. J.).
May 25, 1972:	Filed Statutory Notice to Convene Three-Judge Court (Clerk of Court).
June 5, 1972:	Filed Memorandum of Law in Support of Federal Defendants' Motion to Dismiss or for Summary Judgment.
June 8, 1972:	Three-Judge Court Convened Before Paul R. Hays, C. J., Marvin E. Frankel, D. J., and Arnold Bauman, D. J. Decision Reserved.
July 24, 1972:	Filed Opinion dismissing the action (Hays, C. J., and Bauman, D. J.) and Dissenting Opinion (Frankel, D. J.).

RELEVANT DOCKET ENTRIES

Sept. 15, 1972:	Filed Notice of Appeal to the Supreme Court of the United States.
Apr. 24, 1973:	Filed Copy of Order of the Supreme Court of the United States.
Apr. 24, 1973:	Filed Copy of Order of the Supreme Court of the United States Noting Probable Jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

71 Civ. 5556

JEAN CHRISTIAN and VICTOR L. GREEN, indivually and on behalf of all others similarly situated, PLAINTIFFS

—against—

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT; its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, JAMES D. HODGSON; UNITED STATES POSTAL SERVICE CORPORATION; its Chairman, ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, JOHN CONNALLY, DEFENDANTS

AMENDED COMPLAINT—CLASS ACTION—
Filed March 10, 1972

I.

NATURE OF CLAIM

1. Plaintiffs, individually and on behalf of all others similarly situated, seek declaratory relief, injunctive relief and a *writ of mandamus* to redress the denial of unemployment insurance benefits under the Unemployment Compensation for Federal Employees Program without a fair hearing as required by the Fifth and Fourteenth Amendments to the United States Constitution, by 42 U.S.C. § 1983, by 42 U.S.C. § 1985(3), by 42 U.S.C. § 503 and by 5 U.S.C. §§ 8501-8508.

II.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 2201 and 2202 which authorize the issuance of declaratory judgments, to 28 U.S.C. § 1343(3) granting original jurisdiction to District Courts over actions brought under the United States Constitution, 42 U.S.C. §§ 1983 and 1985 and to 29 U.S.C. § 1361 relating to actions in the nature of *mandamus*.

III.

PLAINTIFFS

3. Plaintiff Jean Christian is forty-five years old, a black citizen of the United States and a resident of Brooklyn, New York. Subsequent to her termination as a federal civilian employee with the United States Post Office Department she was denied unemployment insurance benefits without a fair hearing.

4. Plaintiff Victor L. Green is a citizen of the United States and a resident of Bronx, New York. Subsequent to his termination as a federal civilian employee with the United States Department of the Treasury, he was denied unemployment insurance benefits and has not and will not be given a fair hearing.

IV.

DEFENDANTS

5. Defendant New York State Department of Labor, Division of Employment (hereafter "Division of Employment") is the agency responsible for the administration of unemployment insurance in the State of New York and is a party to an agreement with the United States Department of Labor pursuant to 5 U.S.C. §§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to federal employees and

deny the right to a fair hearing concerning eligibility for such benefits.

6. Defendant Louis L. Levine is the Industrial Commissioner of the New York State Department of Labor, Division of Employment, and is responsible for the administration of unemployment insurance in the State of New York.

7. Defendant United States Department of Labor (hereafter "Department of Labor") is the agency responsible for the administration of unemployment insurance benefits for federal employees under 5 U.S.C. §§ 8501 *et seq.* and has entered into an agreement with the New York State Department of Labor, Division of Employment, pursuant to 5 U.S.C. §§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to federal employees and deny to such employees the right to a fair hearing concerning eligibility for such benefits.

8. Defendant James D. Hodgson is the Secretary of the United States Department of Labor and is responsible for the administration of unemployment insurance for federal employees.

9. Defendant United States Postal Service Corporation (hereafter "Postal Service") assumed all obligations and liabilities of the United States Post Office Department, which is the the former employer of Plaintiff Christian and, pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Christian's employment.

10. Defendant Elmer T. Klassen is Postmaster General of the United States Postal Service Corporation and is responsible for the transmission of information to state unemployment insurance agencies such as the Defendant Division of Employment.

11. Defendant United States Civil Service Commission (hereafter the "Civil Service Commission") is responsible for the administration and regulation of working and termination procedures for federal employees.

12. Defendant Robert E. Hampton is the Chairman of the United States Civil Service Commission and, in conjunction with Defendants Johnson and Spain, is responsible for the administration of federal employee procedures.

13. Defendant James E. Johnson is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Spain, is responsible for the administration of federal employee procedures.

14. Defendant Jayne Spain is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Johnson, is responsible for the administration of federal employee procedures.

15. Defendant United States Department of the Treasury ("hereafter "Department of Treasury") is the former employer of Plaintiff Victor L. Green and, pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Green's employment.

16. Defendant John Connally is the Secretary of the United States Department of the Treasury, and is responsible for the transmission of information to state unemployment insurance agencies such as the Defendant Division of Employment.

V.

CLASS ACTION

17. Plaintiffs bring this action pursuant to Rules 23 (a) and 23(b)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all persons similarly situated. The class is composed of all federal employees who have been or will be subject to denial or termination of unemployment compensation benefits under the Unemployment Compensation for Federal Employees (hereafter "UCFE") Program on the basis of findings of fact

by former federal employers which are conclusive and binding on the New York State Department of Labor, Division of Employment without a fair hearing. The class is so numerous that joinder of all members of the class would be impracticable. Upon information and belief, the class consists of at least 4,000 individuals.

Plaintiffs are former employees of federal employers who were denied benefits on the basis of factual findings made without a hearing by their employers. Benefits were denied Plaintiffs because the New York State Department of Labor, Division of Employment gave final and conclusive effect to the findings of Plaintiffs' employers. Thus Plaintiffs will fairly and adequately protect the interests of the class they represent in this action.

The questions of law common to the members of the class are the conformity of the practice of denying fair hearings to federal employees who apply for unemployment insurance with the requirements of the Fifth and Fourteenth Amendments of the United States Constitution and the Social Security Act. The question of fact common to the members of the class are whether or not such persons were terminated on the basis of findings of fact on which the hearings were held.

The Defendants in following a policy which deprives the members of the class of a fair hearing have acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive and declaratory relief.

VI.

STATEMENT OF THE CLAIM

18. Plaintiff Christian was a probationary employee with the United States Post Office Department from April 4, 1970, to October 2, 1970.

19. On October 2, 1970, Plaintiff Christian was discharged by the Post Office Department because of an allegedly unsatisfactory attendance record.

20. The Post Office Department's alleged reason for the termination of Plaintiff Christian's employment was that she had been absent without notifying the Post Office Department on August 31 and September 1, 1970.

21. Plaintiff Christian filed an original claim with the Defendant Division of Employment under the UCFE Program, 5 U.S.C. §§ 8502, 8506, on October 3, 1970.

22. By initial determination effective October 3, 1970, the Defendant Division of Employment ruled that Plaintiff Christian was disqualified because she had voluntarily left her employment without good cause by provoking her discharge.

23. This initial determination was based on reports made by the Post Office Department stating that Plaintiff Christian's employment was terminated during her probationary period because of her unsatisfactory attendance record and her absences on August 31 and September 1, 1970 without notifying the Post Office Department as to such absences.

24. The initial determination was reversed by Referee Milton Weinstein of the Division of Employment on January 8, 1971, after a full hearing in which the Industrial Commissioner and the Plaintiff were heard.

25. Referee Weinstein found that:

> "Claimant's parental responsibilities required her absence from work on August 31 and September 1. Having had the employer advised of the reason for her absence she did not willfully act in a manner to provoke her discharge. She did not voluntarily leave her employment."

26. Referee Weinstein did not accord "final and conclusive" weight to the findings of the Post Office Department as required by 5 U.S.C. § 8506.

27. An appeal was taken from the Referee's decision to the Appeal Board of the New York State Department of Labor, Division of Employment. The Board is charged with review of determinations by the Referees of the Division of Employment.

28. The Appeal Board reversed Referee Weinstein's decision and upheld the initial determination. In its deci-

sion, dated April 16, 1971, the Appeal Board stated that it was bound, under 5 U.S.C. § 8506, by the federal agency's findings and that Plaintiff Christian had provoked her discharge, which was tantamount to a voluntary leaving of employment without good cause.

29. The decision of the Appeal Board is final on all questions of fact under New York unemployment insurance law.

30. By Act of Congress effective primarily on July 1, 1971, the United States Post Office Department became the Defendant United States Postal Service Corporation, under which Act the latter assumed all the obligations and liabilities of the former, and under which Act the latter remains a federal agency bound by the requirements of 5 U.S.C. § 8506 and the regulations promulgated thereunder.

31. Plaintiff Christian was not afforded a hearing by the Defendant Civil Service Commission. Under 5 C.F.R. § 315.806, issued pursuant to 5 U.S.C. §§ 1301, 3301, 3302 and Executive Orders 10577 and 11103, a probationary federal employee is given no hearing on the grounds for termination of employment unless discrimination or improper termination procedure is alleged.

32. Plaintiff Christian was not afforded a hearing by either the Post Office Department or the Department of Labor. Under the UCFE Program, the employing agency makes findings of fact, including reasons for termination, and furnishes them to the Division of Employment. 5 U.S.C. § 8506.

33. 5 U.S.C. § 8506 also provides that these findings of fact made by the employing federal agency are to be "final and conclusive" upon the state agency determining the eligibility of a federal employee for unemployment insurance. The Department of Labor regulations governing this procedure, 20 C.F.R. §§ 609.9 *et seq.*, provide only for a review of the federal agency findings, but not for a hearing. 20 C.F.R. § 609.18, as amended, July, 1971, provides for federal agency hearings over contested facts only where an employee has resigned.

34. The New York State Department of Labor, Division of Employment, Appeal Board did not afford Plain-

tiff Christian a hearing concerning the reasons for her termination. The Board found itself bound by the federal agency's findings of fact, in accord with 5 U.S.C. § 8506 and 20 C.F.R. § 609.18 and thereby rejected the *de novo* findings of the Referee.

35. Plaintiff Green was a probationary employee with the Defendant United States Department of the Treasury from December 24, 1970, to December 18, 1971.

36. During his employment, Plaintiff Green was based in New York as a skymarshall for the Bureau of Customs of the Defendant Department of the Treasury.

37. On December 18, 1971, Plaintiff Green was discharged by the Defendant Department of the Treasury for the alleged reason of drinking an alcoholic beverage within twenty-four hours of flying.

38. Plaintiff Green filed an original claim with the Defendant Division of Employment, under the UCFE Program, 5 U.S.C. §§ 8502, 8506, on December 23, 1971.

39. By initial determination effective on February 17, 1972, the Defendant Division of Employment ruled that Plaintiff Green was disqualified because he had engaged in misconduct by drinking an alcoholic beverage within twenty-four hours of flying.

40. This initial determination was based upon reports made by the Defendant Department of the Treasury stating that Plaintiff Green was terminated during probation and that Plaintiff Green was terminated for drinking an alcoholic beverage within twenty-four hours of flying.

41. Plaintiff Green received a Notice of Determination from the Defendant Division of Employment which advised him that he had been disqualified from receiving benefits, and that he had a right to a hearing before the Defendant Division of Employment. He was also advised orally, however, that the findings of fact made by the Defendant Department of the Treasury were final and conclusive upon the Defendant Division of Employment.

42. Plaintiff Green was not afforded a hearing by the Defendant Civil Service Commission. Under 5 C.F.R. § 315.806, issued pursuant to 5 U.S.C. §§ 1301, 3302 and Executive Orders 10577 and 11103, a probationary fed-

eral employee is given no hearing on the grounds for termination of employment unless discrimination or improper termination procedure is alleged.

43. Plaintiff Green was not afforded a hearing by either the Defendant Department of the Treasury or the Defendant Department of Labor. Under the UCFE Program, the employing federal agency, the Defendant Department of Labor, makes findings of fact, including reasons for termination, and furnishes them to the Division of Employment. 5 U.S.C. § 8506.

44. 5 U.S.C. § 8506 also provides that these findings of fact made by the employing federal agency are to be "final and conclusive" upon the state agency determining the eligibility of a federal employee for unemployment compensation insurance. The Department of Labor regulations governing this procedure, 20 C.F.R. §§ 609.9 *et seq.*, provide only for a review of the federal agency findings, but not for a hearing. 20 C.F.R. § 609.18, as amended, July, 1971, provides for federal agency hearings over contested facts only where an employee has resigned.

45. The New York State Department of Labor, Division of Employment will not afford Plaintiff Green a hearing concerning the reasons for his termination, to the extent that the Division of Employment considers itself bound by the federal agency's findings of fact, in accord with 5 U.S.C. § 8506 and 20 C.F.R. § 609.18.

First Cause of Action

46. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Second Cause of Action

47. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of their right to equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Third Cause of Action

48. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of 42 U.S.C. § 1983.

Fourth Cause of Action

49. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of 42 U.S.C. § 1985.

Fifth Cause of Action

50. Defendants have deprived the Plaintiffs of unemployment benefits without a fair hearing in violation of the mandate and intent of 5 U.S.C. §§ 8501-8506 and 42 U.S.C. § 503.

Prayer for Relief

Wherefore, Plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this cause, convene a three-judge District Court pursuant to 28 U.S.C. §§ 2282 and 2284 to determine this controversy and set this case promptly for a hearing.

2. Enter a declaratory judgment declaring Defendants' denial of Plaintiffs' unemployment insurance benefits without a fair hearing to be in violation of Due Process and Equal Protection, of 42 U.S.C. §§ 503, 1983 and 1985 and of 5 U.S.C. §§ 8501-8506.

3. Enter a preliminary and permanent injunction restraining Defendants from administering the UCFE Program so as to deny Plaintiffs and the members of their class a fair hearing, and restraining Defendants from denying unemployment insurance benefits due to and withheld from the Plaintiffs and the members of their class.

4. Enter an Order in the nature of *mandamus* compelling the federal Defendants to administer the UCFE program so as to grant Plaintiffs and the members of their class fair hearings.

5. Grant such other and further relief as this Court may find just, equitable and proper.

Dated: March 10, 1972
New York, New York

Respectfully submitted,

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Attorneys for Plaintiffs

AFFIDAVIT OF JEAN CHRISTIAN ATTACHED TO AMENDED COMPLAINT

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

JEAN CHRISTIAN, being duly sworn, deposes and says:

1. I reside at 81 DeSales Place, Brooklyn, New York with my minor daughter.

2. From April 4, 1970, to October 2, 1970, I was employed in the federal service as a Chauffeur for the United States Post Office in Brooklyn, New York.

3. On October 2, 1970, during my probationary period, my federal employment was terminated, and on October 3, 1970, I made original claim for unemployment insurance benefits.

4. On information and belief, on November 5, 1970, the Post Office transmitted findings to the state unemployment insurance agency which gave as the reasons for separation from federal service 1) termination during probation; and 2) unexcused absences on August 31, 1970, and September 1, 1970 together with an unsatisfactory attendance record.

5. On or about November 6, 1970, the Industrial Commissioner of the State of New York made an initial determination disallowing unemployment insurance benefits to me on the grounds that I had voluntarily left employment without good cause in that I provoked my discharge by my absences of August 31, 1970, and September 1, 1970, and further, that the federal findings were final, conclusive, and binding. (See copy of Notice of Determination attached hereto as Exhibit "A").

6. The aforesaid Notice of Determination advised me that I had the right to a hearing but at the same time stated that the facts found by the Post Office were final, conclusive, and binding.

7. On November 12, 1970, I requested a hearing from the state unemployment insurance agency on the ground

that the termination of my employment was unfair, I was denied a hearing by the federal agency, and I had good reason for being absent.

8. As a probationary employee of the Post Office, I had a limited right of appeal to the Civil Service Commission on the issue of my termination, an appeal which was confined to consideration of charges of discrimination and improper procedure. § 315.80 6, Civil Service Regulations. This appeal was not available to challenge the federal findings as they might relate to claims for unemployment insurance.

9. On December 16, 1970, a hearing was held before a Referee designated by the state agency. The federal agency did not appear. The Industrial Commissioner submitted a statement in lieu of appearance which on information and belief, alleged that I had provoked my discharge because of my attendance record, and that the findings of the federal agency must be accepted as fact. I testified on my own behalf.

10. On January 8, 1971, a decision was rendered by the Referee overruling the initial determination and granting my claim for benefits. The Refree held that I had not provoked my discharge, that I had good excuse for my absences, and had duly explained my absences to my employer. (See Copy of Referee's decision attached hereto as Exhibit "B").

11. The Industrial Commissioner appealed the decision of the Referee to the Unemployment Insurance Appeal Board and urged that the Referee be reversed on the ground that the findings of the federal agency were final and conclusive and these findings led to the conclusion, under New York State unemployment insurance law, that I had provoked my discharge. (See copy of letter of Industrial Commissioner submitted in support of his appeal, attached hereto as Exhibit "C").

12. On April 16, 1971, the Appeal Board reversed the Referee holding that the federal findings were final, conclusive, and binding, and based on these findings, I had provoked my discharge. (See copy of the Decision of the Appeal Board attached hereto as Exhibit "D").

13. On August 4, 1970, I had been placed on the "restricted sick leave list" by the Post Office Department, because of three allegedly unexplained absences reported by my supervisor, Mr. Gross. Being placed on the restricted list meant that if I were absent again, I would be required to produce a medical excuse or be deemed AWOL, and penalized accordingly.

14. On the occasions when I was accused of being AWOL, I had explained to my supervisor that I was unable to report my absences because my telephone was out of order. To report an absence, I would have had to telephone my employer at about 6:00 A.M. and it was impossible for me to find a working public phone in my neighborhood at that hour.

15. On August 31, 1970 and September 1, 1970, I did not go to work because my minor daughter, who was my sole responsibility, required my assistance. On August 30, 1970, a Sunday, I learned that my daughter had become pregnant and was seeking an illegal abortion. She was not at home on Sunday. It then became imperative for me to find my daughter to dissuade her from taking this drastic step. I began my search for her on Sunday, without success and continued my search throughout the early morning hours of Monday August 31. Not knowing where I would be at the time I would have to report to my employer, I asked my older daughter (aged 25) who did not live at home to telephone my supervisor to report my absence. My older daughter advised me later that she had telephoned as requested, but that the person who answered the telephone at the Post Office refused to listen to the explanation and told her that I should bring in a doctor's note.

16. I located my minor daughter late in the afternoon of August 31, and found her to be in a very distressed state. I made the decision not leave her in such a state until I was assured that she would take the rash step she had been contemplating. It was not until the afternoon of September 1, 1970 that I was confident that I could leave her without fear for her safety. I again requested my older daughter to telephone my employer

for me on the morning of September 1, which she told me she had done with the same result.

17. When I returned to work on September 2, 1970, I attempted to explain my absences to my supervisor, but he refused to speak with me.

18. I was never given an opportunity by the Post Office or the Civil Service Commission for a hearing during which I could challenge the findings of the Post Office that I had been AWOL on August 31 or September 1, 1970, or on the prior occasions, My supervisor who reported me AWOL refused to listen to my explanations and I was never permitted to confront him before an impartial official of the agency, the Civil Service Commission, or the State unemployment insurance agency.

19. Although I was given a hearing by the state unemployment insurance agency that hearing was not a fair hearing because the federal findings were final conclusive and binding, and the favorable decision of Referee could not therefore, be accorded full weight by the Appeal Board.

20. I have been grievously harmed by being denied unemployment insurance benefits without a fair hearing in that I was deprived of a source of income which I sorely needed after I was separated from federal employment, without due process of law.

21. On information and belief, I would not have been denied unemployment insurance benefits if I had been given a fair hearing and an opportunity to challenge the federal findings in my case because I had a sound and reasonable excuse for being absent on the days in question, and I duly reported my absences, as was found by the Referee.

22. I believe that there are other persons similarly situated to myself who have been denied unemployment compensation for federal employees upon disputed federal findings without being given a fair hearing, and that I can fairly represent the class of such persons.

/s/ Jean Christian
JEAN CHRISTIAN

[Notary Omitted]

EXHIBIT A TO CHRISTIAN AFFIDAVIT:
NOTICE OF DETERMINATION

NEW YORK STATE DEPARTMENT OF LABOR
Division of Employment

NOTICE OF DETERMINATION TO CLAIMANT

Jean Christian
81 DeSales Place
Brooklyn, N.Y. 11207

Local Office Address: Local Office 516
52 West 20th Street
New York, N. Y. 10011

☐ Given
☒ Mailed

Date 11-6-70

050-44-1433
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 10/3/70 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION [Hand Written] You quit your job without good cause.

Local Office Address

Local Office 516
52 West 20th Street
New York, N. Y. 10011

Jean Christian
81 DeSales Place
Brooklyn, N.Y. 11207

☐ Given
☒ Mailed

Date 11-6-70

050-44-1433
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 10/3/70 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION [Hand Written] You quit your job without good cause.

REASON This determination is based on the following: [Hand Written] You provoked your discharge as you were AWOL 8/31/70 & 9/1/70 after warning. A provoked discharge is equivalent to voluntary leaving of employment without good cause. The fact finding done by the federal agency (PO) is final, conclusive and binding under Unemployment Ins. Law.

RENEWING YOUR CLAIM If you are satisfied that this determination is correct, you may apply to renew your claim by reporting to this local office if you are unemployed and believe that you have satisfied the above requirement of subsequent work or earnings.

RIGHT TO A HEARING IF YOU ARE NOT SATISFIED WITH THIS DETERMINATION, YOU MAY ASK FOR A HEARING BEFORE AN IMPARTIAL REFEREE AT NO COST OR OBLIGATION TO YOU.

REQUEST FOR HEARING HOWEVER, YOUR REQUEST MUST BE MADE IN PERSON OR BY MAIL AT THIS LOCAL OFFICE NOT LATER THAN 30 DAYS FROM THE DATE OF THIS NOTICE.

When requesting a hearing, be sure to bring or mail your Insurance Book, Insurance Book Calendar Insert and Claim Card, if issued, with your request.

REPORTING TO PROTECT YOUR RIGHTS until the referee decides the case, CONTINUE TO REPORT to your insurance and employment offices on your assigned days as long as you remain unemployed.

FOR THE INDUSTRIAL COMMISSIONER

By [Illegible]

LO 412.1 (9-69) (over)

19

NOTICE TO EMPLOYER OF DETERMINATION
THAT CLAIMANT IS INELIGIBLE

Date
Mailed_____

TO EMPLOYER:

It has been determined that the claimant on the other side of this form is ineligible for benefits for the period and for the reason shown. However, if the claimant becomes unemployed after meeting the requirements of employment mentioned on the reverse, he will have the right to file a new claim and may thereafter be eligible for benefits.

☐ This notice supersedes the one sent you dated:_____

The cooperation which you have extended to us in furnishing information is appreciated.

FOR THE INDUSTRIAL COMMISSIONER

By_____

Section 620.1 of the Unemployment Insurance Law states in Part:

"(a) A claimant who is dissatisfied with an initial determination of the claim for benefits or any other party affected by such determination may, within thirty days after the mailing or personal delivery of notice of such determination, request a hearing . . ."

EXHIBIT B TO CHRISTIAN AFFIDAVIT:
REFEREE DECISION AND NOTICE OF DECISION

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE REFEREE SECTION

500 Eighth Avenue
New York, N.Y. 10018

[Illegible]

UNDER CHAPTER 85, TITLE 5, OF THE U.S. CODE

DECISION AND NOTICE OF DECISION

In the Matter of:

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

Referee # UCFE-589-70

S.S.# 050-44-1433

DECISION MAILED AND DULY FILED IN THE DEPARTMENT OF LABOR ON January 8, 1971

Local Office # 516
Division of Employment
52 West 20th Street
New York, New York 10011

Main Post Office
2nd Avenue & 10th
Street
Brooklyn, New York

FINDINGS OF FACT: A hearing was held at which claimant appeared and testified. A statement on behalf of the Industrial Commissioner was submitted in lieu of an appearance.

Claimant, a chauffeur, filed for Federal employee benefits Under Chapter 85, Title 5, of the U.S. Code effective October 5, 1970. By initial determination effective October 3, 1970 she was disqualified for voluntary leaving of employment without good cause by provoking her discharge.

From April to October 2, 1970 claimant worked for a Federal Agency. She was unable to report for work on August 31 because one of her daughters had been absent from their home and claimant spent the day looking for her. Her telephone was not always in working order and at her request another daughter telephoned to the employer and advised that she would not be able to report for work that day. She found her daughter during the day but was unable to report for work on September 1 because both she and her daughter were emotionally upset and claimant spent most of the day counselling and cautioning her daughter. At her request her other daughter again called the employer on September 1 and advised that she would be absent that day.

Claimant subsequently received a letter from an officer of the employer in

NEW YORK, N.Y. 10018

[Illegible]

UNDER CHAPTER 85, TITLE 5, OF THE U.S. CODE

DECISION AND NOTICE OF DECISION

In the Matter of:

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

N
Referee # UCFE-589-70

S.S.# 050-44-1433

DECISION MAILED AND DULY FILED IN THE DEPARTMENT OF LABOR ON January 8, 1971

Local Office # 516
Division of Employment
52 West 20th Street
New York, New York 10011

Main Post Office
2nd Avenue & 10th Street
Brooklyn, New York

FINDINGS OF FACT: A hearing was held at which claimant appeared and testified. A statement on behalf of the Industrial Commissioner was submitted in lieu of an appearance.

Claimant, a chauffeur, filed for Federal employee benefits Under Chapter 85, Title 5, of the U.S. Code effective October 5, 1970. By initial determination effective October 3, 1970 she was disqualified for voluntary leaving of employment without good cause by provoking her discharge.

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Claimant subsequently received a letter from an officer of the employer in charge that he had received a report from her supervisor stating that she had been absent without official leave on August 31, 1970 and September 1, 1970 and that she failed to notify her place of assignment of her intended absence, and that in view thereof her employment would be terminated during probation at

the close of business October 2, 1970. Claimant attempted to have her union intercede but was unsucessful. The employer reported on Form-FL-2N the reason for separation as "Termination during probation".

OPINION: Claimant's parental responsibilities required her absence from work on August 31 and September 1. Having had the ~~employer~~ employer advised of the reason for her absence she did not wilfully act in a manner to provoke her discharge. She did not voluntarily leave her employment.

DECISION: The initial determination is overruled.

/s/ MILTON E. WEINSTEIN
Referee

amb

EXHIBIT C TO CHRISTIAN AFFIDAVIT:
STATEMENT OF INDUSTRIAL COMMISSIONER
IN SUPPORT OF HIS APPEAL FROM REFEREE DECISION

PUBLIC EMPLOYMENT SERVICE
SERVICE FOR EVERYONE
LOCAL—STATE—NATIONAL

STATE OF NEW YORK
DEPARTMENT OF LABOR
DIVISION OF EMPLOYMENT

500 Eighth Avenue—New York, New York 10018
Tel. 563-7660

COUNSEL'S OFFICE

March 2, 1971

New York State Unemployment
Insurance Appeal Board
500 Eighth Avenue
New York, New York 10018

Re: Jean Christian
S.S. No. 050-44-1433
Case No. UCFE-589-70
A.B. No. 162, 874 F

Gentlemen:

The Industrial Commissioner submits this statement in support of his appeal from the decision of the referee filed January 8, 1971 overruling an initial determination disqualifying claimant effective October 3, 1970 for voluntary leaving of her employment without good cause by provoking her discharge.

The issue presented is whether claimant pursued a course of conduct which she knew or should have known would cause her discharge from her employment, and whether claimant was subject to disqualification pursuant to Section 593.1 of the Unemployment Insurance Law.

Claimant was employed by a federal agency from April 3, 1970 to October 2, 1970. She filed for benefits under Chapter 85, Title 5 of the United States Code. According to the report of the federal agency, claimant's employment was terminated during her probationary period because of her unsatisfactory attendance record, climaxed by her absences on August 31 and September 1, 1970 without notifying the employer as to such absences (See employer's letters dated September 2, and September 8, 1970 in answer to FL 4 and F1 2N). Claimant advised the insurance office that she did not call the employer each time she was absent because she could not get to a telephone that was working; that all the telephones in the neighborhood were not in working order (LO 413 dated 10/19/70). Claimant further contended that she failed to report to work on August 31, and September 1, 1970 because of compelling domestic problems, and that she requested an older daughter, not residing with her, to telephone the employer both August 31, and September 1, and that the daughter did make the telephone calls (smp. 9 and 11). The employer reported that it received no such notification of claimant's absences on August 31, and September 1, 1970. The record further establishes that claimant had a poor attendance record, and had been warned by the employer with reference to same. As of August 4, claimant was on a restricted list so that if she were absent even one more day, claimant needed a medical substantiation. It should be noted that during the period in issue, claimant was during her probationary period.

The Appeal Board has held that the findings of fact by a federal agency as to the reasons for termination of employment are final, binding and conclusive on both the referee and the Appeal Board (UCFE-1708). In the instant case, it is submitted that the findings of fact as outlined by the Post Office are such that lead to but one conclusion, to wit, that claimant had a poor attendance record; had been warned with reference to same; was absent on August 31, and September 1 without notification to the employer and was discharged during her

probationary period. Under the circumstances, claimant knew or should have known that such conduct on her part, especially during her probationary period, would lead to her discharge and claimant is, therefore, subject to disqualification pursuant to Section 593.1 of the Labor Law (See *Matter of Malaspina*, 309 N.Y. 413, affirming 285 App. Div. 564, reversing A.B. #42,606).

For the reasons stated, the decision of the referee should be reversed.

Very truly yours,

HYMAN AMSEL
Counsel

By: /s/ Herman Sakoloff

HS:ems

cc: Jean Christian
Mr. Memelsdorff

EXHIBIT D TO CHRISTIAN AFFIDAVIT:
APPEAL BOARD DECISION

Harry Zankel
Chairman
Isidore Schechter
John A. Rogalin
James R. Rhone
Gregory J. Pope
Members

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE APPEAL BOARD

500 Eighth Avenue
New York, N.Y. 10018

Ramon L. Tinacehd
Executive Secretary

LOngacre 3-7660

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

S.S.A. # 050-44-1433 Appeal #162,874F

Referee # UCFE-589-70

Division of Employment
Local Insurance Office
#516
52 West 20th Street
New York, New York 10011

PLEASE TAKE NOTICE that the decision set forth below was mailed and filed in the Department of Labor on Apr. 16, 1971

Main Post Office
2nd Avenue & 10th Street
Brooklyn, New York

PLEASE TAKE FURTHER NOTICE that within thirty days after the mailing of this decision, the Commissioner or any other party affected thereby who appeared at the appeal before the Board may appeal questions of law involved in such decision to the Appellate Division of the Supreme Court, Third Department. Written notice of such appeal should be mailed to the Unemployment Insurance Appeal Board, 500 Eighth Avenue, New York, N.Y. 10018, within the time above stated.

DECISION OF THE BOARD

PRESENT: John A. Rogalin, Harry Zankel
Members

The Industrial Commissioner appeals from the decision of the referee filed January 8, 1971, overruling the initial determination of the local office disqualifying claimant, a former Federal employee filing for unemployment compensation under Chapter 85, Title 5 of the United States Code, from receiving benefits effective October 3, 1970, because she voluntarily left her employment without good cause by provoking her discharge.

A hearing was held before the referee at which all parties were accorded a full opportunity to be heard and at which claimant appeared and testimony was taken. A written statement was submitted by the Industrial Commissioner in lieu of appearance at such hearing. The Board considered a written statement submitted on behalf of the Industrial Commissioner on appeal.

Based on the record and testimony in this case, the Board makes the following

Chairman
Isidore Schechter
John A. Rogalin
James R. Rhone
Gregory J. Pope
Members

UNEMPLOYMENT INSURANCE APPEAL BOARD

500 Eighth Avenue
New York, N.Y. 10018

LOngacre 3-7660

Ramon L. Tinacehd
Executive Secretary

Jean Christian
81 De Sales Place
Brooklyn, New York 11207

S.S.A. # 050-44-1433 Appeal #162,874F

Referee # UCFE-589-70

Division of Employment
Local Insurance Office
#516
52 West 20th Street
New York, New York 10011

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DECISION OF THE BOARD

PRESENT: John A. Rogalin, Harry Zankel
Members

The Industrial Commissioner appeals from the decision of the referee filed January 8, 1971, overruling the initial determination of the local office disqualifying claimant, a former Federal employee filing for unemployment compensation under Chapter 85, Title 5 of the United States Code, from receiving benefits effective October 3, 1970, because she voluntarily left her employment without good cause by provoking her discharge.

A hearing was held before the referee at which all parties were accorded a full opportunity to be heard and at which claimant appeared and testimony was taken. A written statement was submitted by the Industrial Commissioner in lieu of appearance at such hearing. The Board considered a written statement submitted on behalf of the Industrial Commissioner on appeal.

Based on the record and testimony in this case, the Board makes the following

FINDING OF FACT: Claimant was employed for a period of six months as a letter carrier by the post office. She was repeatedly reprimanded for her excessive absences, without communicating with her employer. On August 4, 1970, claimant was placed on a "restricted list"

which meant that she must thereafter avoid any further absence, other than for illness. Although claimant alleges that she again had to be absent on August 31 and September 1, 1970, due to family responsibilities, and that her daughter telephoned to the employer on those days and explained the absences, the employer did not receive any telephone call either from the claimant or her daughter. Because of claimant's continued absences without calling in, the employer terminated her services at the end of her probationary period, October 2, 1970. Federal Agency informed the local office that claimant's absences had invariably been on an "A W O L" basis.

OPINION: We are bound by the finding of the Federal agency that claimant was absent on August 31 and September 1, 1970, without notifying the employer. Claimant knew or should have known that these absences without notice would place her employment in jeopardy, especially in view of the warnings she received and that she was still on a probationary status. We hold that claimant provoked her discharge, which was tantamount to a voluntary leaving of employment without good cause.

DECISION: The initial determination of the local office is sustained.

The decision of the referee is reversed.

JOHN A. ROGALIN, Member
HARRY ZANKEL, Member

AFFIDAVIT OF VICTOR L. GREEN ATTACHED TO AMENDED COMPLAINT

STATE OF NEW YORK)
) ss.:
COUNTY OF BRONX)

VICTOR L. GREEN, being duly sworn, deposes and says:

1. I reside at 1547 Commonwealth Avenue, Bronx, New York.

2. From December 24, 1970 to December 18, 1971, I was employed in the federal service as a Skymarshall for the United States Department of the Treasury, Bureau of Customs, based in New York.

3. On December 14, 1971, during by probationary period, my federal employment was terminated, and on December 23, 1971, I made original application and claim for unemployment insurance benefits.

4. On information and belief, the Department of the Treasury, Bureau of Customs, transmitted findings to the state unemployment insurance agency which gave as the reasons for separation from service 1) termination during probation; and 2) dringing of an alcoholic beverage within twenty-four hours of flying.

5. On or about February 17, 1972, the Industrial Commissioner of the State of New York made an initial determination disallowing unemployment insurance benefits to me on the grounds that I had drunk an alcoholic beverage within twenty-four hours of departure time for a flight and that the federal findings were conclusive. (See copy of Notice of Determination attached hereto as Exhibit "A".)

6. The aforesaid Notice of Determination advised me that I had the right to a hearing but at the same time I was told that the facts found by the Department of the Treasury, Bureau of Customs were final, conclusive and binding.

7. On February 17, 1972, I requested a hearing from the state unemployment insurance agency on the ground that the termination of my employment was unfair, I was

denied a hearing by the federal agency, and I had not committed the act alleged.

8. As a probationary employee of the Treasury Department, Bureau of Customs, I had a limited right of appeal to the Civil Service Commission on the issue of my termination, an appeal which was confined to consideration of charges of discrimination and improper procedure. § 315.80 6, Civil Service Regulations. This appeal was not available to challenge the federal findings as they might relate to claims for unemployment insurance.

9. I had never been accused of any misconduct until receipt of the notice of termination, and had no reason to believe that I would be so accused.

10. I have been grievously harmed by being denied unemployment benefits without a fair hearing in that I was deprived of a source of income which I sorely needed after I was separated from federal employment without due process of law.

11. On information and belief, I would not have been denied unemployment insurance benefits if I had been given a fair hearing and an opportunity to challenge the federal findings in my case because I was and am innocent of the charges which led to my dismissal and believe I could prove that in impartial hearing.

12. I believe that there are other persons similarly situated to myself who have been denied unemployment compensation for federal employees upon disputed federal findings without being given a fair hearing, and that I can fairly represent the class of such persons.

/s/ Victor L. Green
VICTOR L. GREEN

[Notary Omitted]

EXHIBIT A TO GREEN AFFIDAVIT:
NOTICE OF DETERMINATION

NEW YORK STATE DEPARTMENT OF LABOR
Division of Employment

NOTICE OF DETERMINATION TO CLAIMANT

Local Office
Address

Victor L. Green
1547 Commonwealth Ave.
Bronx, N. Y. 10460
Apt. B1

☒ Given
☐ Mailed
Date 2/17/72

516-46-7380
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 2/19/71 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION [Hand Written] You were fired for misconduct in connection with your employment.

NOTICE OF DETERMINATION TO CLAIMANT

Local Office
Address

Victor L. Green
1547 Commonwealth Ave.
Bronx, N. Y. 10460
Apt. B1

☒ Given
☐ Mailed
Date 2/17/72

516-46-7380
S.S. Acct. No.

No unemployment insurance benefits can be paid to you for the period beginning 2/19/71 until you have subsequently worked for an employer not less than 3 days in each of 4 weeks or earned at least $200. Self-employment and earnings from self-employment will not count.

DETERMINATION — [Hand Written] You were fired for misconduct in connection with your employment.

REASON — This determination is based on the following: [Hand Written] You drank an alcoholic beverage within 24 hours of departure time for a flight. Sky marshalls are not permitted to drink within 24 hours prior to flying.

RENEWING YOUR CLAIM — If you are satisfied that this determination is correct, you may apply to renew your claim by reporting to this local office if you are unemployed and believe that you have satisfied the above requirement of subsequent work or earnings.

RIGHT TO A HEARING — IF YOU ARE NOT SATISFIED WITH THIS DETERMINATION, YOU MAY ASK FOR A HEARING BEFORE AN IMPARTIAL REFEREE AT NO COST OR OBLIGATION TO YOU.

REQUEST FOR HEARING — HOWEVER, YOUR REQUEST MUST BE MADE IN PERSON OR BY MAIL AT THIS LOCAL OFFICE NOT LATER THAN 30 DAYS FROM THE DATE OF THIS NOTICE.

When requesting a hearing, be sure to bring or mail your Insurance Book, Insurance Book Calendar Insert and Claim Card, if issued, with your request.

REPORTING — TO PROTECT YOUR RIGHTS until the referee decides the case, CONTINUE TO REPORT to your insurance and employment offices on your assigned days as long as you remain unemployed.

FOR THE INDUSTRIAL COMMISSIONER

By [Illegible]

(over)

LO 412.1 (9-69)

81

[Caption and Title Omitted]

ANSWER OF FEDERAL DEFENDANTS DEPARTMENT OF LABOR, JAMES D. HOGDSON, POSTAL SERVICE CORPORATION, ELMER T. KLASSEN CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, AND JAYNE SPAIN TO THE AMENDED COMPLAINT—Filed March 28, 1972

The defendants, United States Department of Labor, James D. Hodgson, United States Postal Service Corporation, Elmer T. Klassen, United States Civil Service Commission, Robert E. Hampton, James E. Johnson, Jayne Spain, by their attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York for their answer to the complaint as amended:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the complaint, except deny the allegations insofar as they purport to state a rule of law respecting the requirement of providing a fair hearing.

2. Deny the allegations contained in paragraph 2 of the complaint.

3. Admit the allegations of the first sentence of Paragraph 3 of the complaint and deny the allegations of the second sentence.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of the complaint.

5. Admit the allegations of Paragraph 5 of the complaint except deny that the statutes referred to deny a fair hearing as alleged.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the complaint.

7. Admit the allegations of Paragraph 7 of the complaint except deny those allegations that refer to a denial of a right to a fair hearing.

8-14. Admit the allegations of Paragraphs 8 through and including Paragraph 14 of the complaint.

15. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 of the complaint.

16. Admit the allegations of Paragraph 16 of the complaint.

17. Deny the allegations contained in Paragraph 17 of the complaint, except state that plaintiff Christian is a former federal employee.

18. Admit the allegations of Paragraph 18 of the complaint.

19-20. Deny the allegations of Paragraphs 19 and 20 of the complaint, and state that plaintiff Christian was discharged by reason of her total record of unsatisfactory conduct of which the instances mentioned in Paragraphs 19 and 20 were a part.

21-22. Admit the allegations of Paragraphs 21 and 22 of the complaint.

23. Deny the allegations of Paragraph 23 of the complaint, except deny knowledge and information sufficient to form a belief as to what the basis of the initial determination was.

24-28. Admit the allegations of Paragraphs 24 through and including Paragraph 28.

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29 of the complaint.

30. Admit the allegations of Paragraph 30 of the complaint.

31. Admit the allegations of Paragraph 31 of the complaint, but state further that plaintiff never requested a hearing.

32-34. Admit the allegations of Paragraphs 32 through and including Paragraph 34 of the complaint.

35-45. Deny knowledge or information sufficient to form a belief as to the allegations of Paragraphs 35 through and including Paragraph 45 of the complaint.

46-50. Deny the allegations of Paragraph 46 through and including Paragraph 50 of the complaint.

First Affirmative Defense

51. This Court lacks jurisdiction over the subject matter of this action.

Second Affirmative Defense

52. The complaint fails to state a cause of action upon which relief may be granted.

Third Affirmative Defense

53. State that plaintiff was dismissed from probationary federal employment for cause.

WHEREFORE, defendants demand judgment dismissing this action together with the costs and disbursements of this action, and such other and further relief as this court deems justified.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for defendants United
States Postal Service Corporation, Klassen, United States
Labor Department, Hodgson,
United States Civil Service Commission, Hampton, Johnson
and Spain

By: /s/ Taggart D. Adams
TAGGART D. ADAMS
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: (212) 264-6335

[Caption and Title Omitted]

ANSWER OF THE STATE DEFENDANTS TO THE AMENDED COMPLAINT—Filed April 10, 1972

The defendants, NEW YORK STATE DEPARTMENT OF LABOR and LOUIS L. LEVINE (hereinafter "State defendants") by their attorney LOUIS J. LEFKOWITZ, Attorney General of the State of New York, for their answer to the complaint as amended:

FIRST: Deny the allegations of paragraph "1" insofar as they purport to state a rule of law respecting the requirements of providing a fair hearing and insofar as they claim that the State defendants do not provide such a hearing.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "3" except deny that plaintiff Christian was denied a fair hearing and admit that she was denied unemployment insurance benefits.

THIRD: Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "4" except deny that plaintiff Green was denied a fair hearing and admit that he was denied unemployment insurance benefits.

FOURTH: Admit the allegations of paragraph "5" except deny that the State defendants deny a fair hearing.

FIFTH: Admit the allegations of paragraph "6".

SIXTH: Admit the allegations of paragraph "7" except deny that the State defendants deny a fair hearing.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "8" through and including paragraph "16".

EIGHTH: Deny the allegations in paragraph "17" except state that plaintiffs are former federal employees who were found by the State defendants not to be entitled to unemployment insurance benefits.

NINTH: Admit the allegations of paragraph "18".

TENTH: Deny the allegations of paragraphs "19" and "20" except state that plaintiff Christian was discharged in part because of the reasons set forth in those paragraphs.

ELEVENTH: Admit the allegations of paragraphs "21" and "22".

TWELFTH: Deny the allegations of paragraph "23" except state that the initial determination was based in part on Post Office Department reports.

THIRTEENTH: Admit the allegations of paragraphs "24" and "25".

FOURTEENTH: Deny the allegations of paragraph "26".

FIFTEENTH: Admit the allegations of paragraph "27" except state that referees and the Appeal Board are not under the jurisdiction of the Division of Employment.

SIXTEENTH: Admit the allegations of paragraphs "28" and "29".

SEVENTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "30" and "31".

EIGHTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph "32" and admit the second sentence thereof.

NINETEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "33".

TWENTIETH: Deny the allegations of paragraph "34" except state that the Board is bound by the federal agency's findings of fact with respect to the reasons for termination.

TWENTY-FIRST: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "35" and "36".

TWENTY-SECOND: Admit that the allegations of paragraph "37" constitute at least part of the reason for termination.

TWENTY-THIRD: Admit the allegations of paragraphs "38" and "39" except state with respect to paragraph "39" that the initial determination was issued on February 17, 1972 effective as of December 19, 1971.

TWENTY-FOURTH: Deny the allegations of paragraph "40" except state that the initial determination was based in part on Treasury Department reports.

TWENTY-FIFTH: Admit the allegations of the first sentence of paragraph "41". Deny knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph "41".

TWENTY-SIXTH: Deny knowledge and information sufficient to form a belief as to the truth of the allegations of paragraphs "42" through "44".

TWENTY-SEVENTH: Deny the allegations of paragraphs "45" through "50".

FIRST AFFIRMATIVE DEFENSE

TWENTY-EIGHTH: This Court lacks jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

TWENTY-NINTH: The complaint fails to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

THIRTIETH: In cases involving the termination (as distinguished from the resignation) of federal probationary employees, the State defendants are bound by the findings of fact of the federal employer as to the reasons for termination. 5 U.S.C. § 8506; 20 C.F.R. §§ 609.9 *et seq.* (as amended to July, 1971).

WHEREFORE, defendants demand judgment dismissing this action together with the costs and disbursements of this action, and such other and further relief as this court deems justified.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
New York State Department
of Labor and Levine

By: /s/ Brenda Soloff
BRENDA SOLOFF
Assistant Attorney General
80 Centre Street
New York, New York 10013
Tel: (212) 488-7402

[Caption and Title Omitted]

PLAINTIFFS' NOTICE OF MOTION FOR SUMMARY JUDGMENT OR FOR THREE-JUDGE COURT AND SUMMARY JUDGMENT —Filed April 17, 1972

SIRS:

PLEASE TAKE NOTICE that upon the attached Motion and Statement of Undisputed Material Facts attached thereto and upon the Pleadings and Affidavits filed in the above-entitled matter, the Plaintiffs will move this Court, in Room 506 of the United States Courthouse, Foley Square, New York, New York, on the 2nd day of May, 1972, at 10:00 A.M. or as soon thereafter as counsel can be heard, for an Order:

(1) Granting Plaintiffs' motion for summary judgment and a preliminary and permanent injunction enjoining the Defendants from enforcing and following 5 U.S.C. § 8506 and 20 C.F.R. § 609.18 and § 609.25 insofar as said statute and regulations deny fair hearings to former federal employees determined ineligible for unemployment compensation benefits under the Unemployment Compensation for Federal Employees (UCFE) Program or; in the alternative,

(2) Granting Plaintiffs' motion for the convening of a three-judge court and for summary judgment and a preliminary and permanent injunction enjoining the Defendants from enforcing and following 5 U.S.C. § 8606 and 20 C.F.R. § 609.18 and § 609.25 insofar as said statute and regulations deny fair hearings to former federal employees determined ineligible for unemployment compensation benefits under the Unemployment Compensa-

tion for Federal Employees (UCFE) Program.

Dated: April 14, 1972
New York, New York

Yours, etc.

[Attorneys and Addresses Omitted]
Attorneys for Plaintiffs

TO:

WHITNEY NORTH SEYMOUR, JR.
TAGGART D. ADAMS
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

LOUIS J. LEFKOWITZ
BRENDA SOLOFF
New York State Attorney General
80 Centre Street
New York, New York 10013

[Caption and Title Omitted]

STATEMENT OF MATERIAL FACTS AS TO WHICH PLAINTIFFS CONTEND THERE IS NO GENUINE ISSUE TO BE TRIED

In support of the foregoing motion for summary judgment, and pursuant to Rule 9(g) of the Rules of the United States Court for the Southern District of New York, Plaintiffs submit the following Statement of Material Facts as to which Plaintiffs contend there is no genuine issue to be tried:

1. Plaintiff Jean Christian is a resident of Brooklyn, New York, and a former employee of the United States Post Office in Brooklyn, New York. (Christian Affidavit ¶ 1, ¶ 2.; Federal Answer One, ¶ 3 ¶ 18.)

2. Plaintiff Victor L. Green is a resident of Bronx, New York, and a former employee of the United States Department of the Treasury, Bureau of Customs, based in New York. (Green Affidavit ¶ 1, ¶ 2.)

3. Defendant New York State Department of Labor, Division of Employment is the agency responsible for the administration of unemployment insurance in the State of New York and is a party to an agreement with the United States Department of Labor pursuant to 5 U.S.C. §§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to Federal employees. (Federal Answer One ¶ 5; State Answer ¶ 4.)

4. Defendant Louis L. Levine is the Industrial Commissioner of the New York State Department of Labor, Division of Employment, and is responsible for the administration of unemployment insurance in the State of New York. (New York Labor Law §§ 10, 530; State Answer ¶ 5.)

5. Defendant United States Department of Labor is the agency responsible for the administration of unemployment insurance benefits for the administration of unemployment insurance benefits for Federal employees under 5 U.S.C. §§ 8501 *et seq.* and has entered into an agreement with the New York State Department of Labor, Division of Employment, pursuant to 5 U.S.C.

§§ 8501 *et seq.* which authorize the payment of unemployment insurance benefits to Federal employees. (Federal Answer One ¶ 7; State Answer ¶ 6.)

6. Defendant James D. Hodgson is the Secretary of the United States Department of Labor and is responsible for the administration of unemployment insurance for Federal employees. (Federal Answer One ¶ 8.)

7. Defendant United States Postal Service Corporation assumed all obligations and liabilities of the United States Post Office Department, which is the former employer of Plaintiff Christian and, pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Christian's employment. (Federal Answer One ¶ 9.)

8. Defendant Elmer T. Klassen is Postmaster General of the United States Postal Service Corporation and is responsible for the transmission of information to State unemployment insurance agencies such as the Defendant Division of Employment. (Federal Answer One ¶ 10.)

9. Defendant United States Civil Service Commission (hereafter the "Civil Service Commission") is responsible for the administration and regulation of working and termination procedures for Federal employees. (Federal Answer One ¶ 11.)

10. Defendant Robert E. Hampton is the Chairman of the United States Civil Service Commission and, in conjunction with Defendants Johnson and Spain, is responsible for the administration of Federal employee procedures. (Federal Answer One ¶ 12.)

11. Defendant James E. Johnson is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Spain, is responsible for the administration of Federal employee procedures. (Federal Answer One ¶ 13.)

12. Defendant Jayne Spain is a Commissioner of the United States Civil Service Commission and, in conjunction with Defendants Hampton and Johnson, is responsible for the administration of Federal employee procedures. (Federal Answer One ¶ 14.)

13. Defendant United States Department of the Treasury is the former employer of Plaintiff Victor L. Green, and pursuant to 5 U.S.C. § 8506 and the regulations promulgated thereunder by the Department of Labor, it transmitted information to the Defendant Division of Employment concerning the reason for the termination of Plaintiff Green's employment. (Green Affidavit ¶ 2, ¶ 4.)

14. Defendant John Connally is the Secretary of the United States Department of the Treasury, and is responsible for the transmission of information to State unemployment insurance agencies such as the Defendant Division of Employment. (Federal Answer One ¶ 16.)

15. Plaintiff Christian was a probationary employee with the United States Post Office Department from April 4, 1970, to October 2, 1970. (Christian Affidavit ¶ 2; Federal Answer One ¶ 18; State Answer ¶ 9.)

16. On October 2, 1970, Plaintiff Christian was discharged by the Post Office Department allegedly because of a record of unsatisfactory conduct which included an unsatisfactory attendance record. (Christian Affidavit ¶ 3, ¶ 4; Federal Answer One ¶ 19, ¶ 20.)

17. Plaintiff Christian filed a valid original claim with the Defendant Division of Employment under the Unemployment Compensation for Federal Employees (UCFE) Program, 5 U.S.C. §§ 8502, 8506, on October 3, 1970. (Christian Affidavit ¶ 3; Federal Answer One ¶ 21; State Answer ¶ 11.)

18. By initial determination effective October 3, 1970, the Defendant Division of Employment ruled that Plaintiff Christian was disqualified because she had voluntarily left her employment without good cause by provoking her discharge. (Christian Affidavit ¶ 5, Exhibit A; Federal Answer One ¶ 22; State Answer ¶ 11.)

19. This initial determination was based on reports made by Post Office Department stating that Plaintiff Christian's employment was terminated during her probationary period because of her unsatisfactory attendance record and her absences on August 31 and September 1, 1970 without notifying the Post Office Department as to such absences. (Christian Affidavit ¶ 4.)

20. The initial determination was reversed by Referee Milton Weinstein of the Division of Employment on January 8, 1971, after a full hearing in which the Industrial Commissioner and the Plaintiff were heard. (Christian Affidavit ¶ 9, ¶ 10; Federal Answer One ¶ 24; State Answer ¶ 13.)

21. Referee Weinstein found that:

> "Claimant's parental responsibilities required her absence from work on August 31 and September 1. Having had the employer advised of the reason for her absence she did not willfully act in a manner to provoke her discharge. She did not voluntarily leave her employment."
>
> (Christian Affidavit, Exhibit B; Federal Answer One ¶ 25; State Answer ¶ 13.)

22. Referee Weinstein did not accord "final and conclusive" weight to the findings of the Post Office Department as required by 5 U.S.C. § 8506. (Federal Answer One ¶ 26.)

23. An appeal was taken from the Referee's decision to the Appeal Board of the New York State Department of Labor. The Board is charged with review of determinations by the Referees. (Christian Affidavit ¶ 11, Exhibit C; Federal Answer One ¶ 27; State Answer ¶ 15.)

24. The New York State Department of Labor, Division of Employment, Appeal Board did not afford Plaintiff Christian a hearing concerning the reasons for her termination. (Federal Answer One ¶ 34.)

25. The New York State Department of Labor reversed Referee Weinstein's *de novo* findings and decision and upheld the initial determination. In its decision, dated April 16, 1971, the Appeal Board stated that it was bound, under 5 U.S.C. § 8506, by the Federal agency's findings and that Plaintiff Christian had provoked her discharge, which was tantamount to a voluntary leaving of employment without good cause. (Affidavit of Christian, Exhibit D; Federal Answer One ¶ 28, ¶ 34; State Answer ¶ 16.)

26. The decision of the Appeal Board is final on all questions of fact under New York unemployment insurance law. (State Answer ¶ 16.)

27. By Act of Congress effective primarily on July 1, 1971, the United States Post Office Department became the Defendant United States Postal Service Corporation, under which Act the latter assumed all the obligations and liabilities of the former, and under which Act the latter remains a Federal agency bound by the requirements of 5 U.S.C. § 8506 and the regulations promulgated thereunder. (Federal Answer One ¶ 30.)

28. Plaintiff Christian was not afforded a hearing by the Defendant Civil Service Commission. (Christian Affidavit ¶ 8; Federal Answer One ¶ 31.)

29. Plaintiff Christian was not afforded a hearing by either the Post Office Department or the Department of Labor. (Federal Answer One ¶ 32.)

30. Plaintiff Green was a probationary employee with the Defendant United States Department of the Treasury from December 24, 1970, to December 18, 1971. (Green Affidavit ¶ 2, ¶ 3.)

31. During his employment, Plaintiff Green was based in New York as a skymarshall for the Bureau of Customs of the Defendant Department of the Treasury. (Green Affidavit ¶ 2.)

32. Effective December 18, 1971, Plaintiff Green was discharged by the Defendant Department of the Treasury for the alleged reason of drinking an alcoholic beverage within twenty-four hours of flying. (Green Affidavit ¶ 2, ¶ 3, ¶ 4.)

36. Plaintiff Green received a Notice of Determination from the Defendant State Department of Labor, Division of Employment, which advised him that he had been disqualified from receiving benefits, and that he had a right to a hearing before the Division of Employment. He was also advised orally, however, that the findings of fact made by the Defendant Department of the Treasury were final and conclusive upon the Defendant New York State Department of Labor, Division of Employment. (Green Affidavit ¶ 6, Exhibit A; Green Affidavit ¶ 6.)

37. The Defendant New York State Department of Labor, Division of Employment, treats as final and conclusive pursuant to 5 U.S.C. ¶ 8506 the reasons for termination of employment submitted to it by Federal government agencies, pursuant to 5 U.S.C. ¶¶ 8501 *et seq.* (State Answer ¶¶ 20, 30.)

38. Plaintiff Green was not afforded a hearing by the Defendant Civil Service Commission. (Green Affidavit ¶ 8.)

39. The total number of Federal employees hired in New York State during the fiscal year June, 1970, to June, 1971, was approximately 35,450. (Stipulation attached as Exhibit B to Plaintiffs' Class Action Motion.)

40. The first year of employment of a Federal employee who is given career or career-conditioned employment is a probationary period. The probationary period is one year. (5 C.F.R. § 315.801, § 315, 802.)

41. The employing Federal agency may terminate the employment of a probationary Federal employee by notifying the employee about its conclusions as to why he is being separated from employment and about the effective date of the action. (5 C.F.R. § 315.804.)

42. A probationary Federal employee has no right to appeal the termination, and is given no hearing on the grounds for termination of employment unless the employee alleges that the termination was based upon discrimination because of race, color, religion or sex, political reasons, martial status, discrimination because of a physical handicap, or improper procedure not in accordance with 5 C.F.R. § 315.805. (5 C.F.R. § 315.806.)

43. Each Federal agency is required to make available to State unemployment compensation agencies information concerning the reasons for termination of Federal service of former Federal employees. (5 U.S.C. § 8506(a).)

44. Within four work days after receipt from a State unemployment compensation agency of a form noting the application of a former Federal employee for unemployment compensation benefits under the UCFE Program, a Federal agency is required to ascribe and transmit its

Federal findings to the State agency or other appropriate person. (20 C.F.R. § 609.6(a).)

45. Under Federal authority as interpreted and applied by the New York State Department of Labor, Division of Employment, Federal findings are final and conclusive on the State agency, except where a Federal civilian employee has contradicted the reasons alleged for his *resignation* and has not received a hearing on the issues involved in the alleged reasons for *resignation*. (5 U.S.C. § 8506; 20 C.F.R. § 609.18(a), as amended, July 20, 1971; *Smith* v. *District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), *on remand*, No. 2232-68 (D.D.C. Feb. 1, 1971); State Answer ¶ 30.)

46. Pursuant to United States Department of Labor regulations providing for a limited *ex parte* review by the Federal agency of the Federal findings, there is no provision for nor right to a hearing. (20 C.F.R. § 609.23; Federal Answer One ¶ 33.)

47. Federal findings are treated as not subject to review by the New York State Department of Labor, Division of Employment, while other determinations and redeterminations are available for review under the State unemployment compensation law. (20 C.F.R. § 609.25, as amended, July 20, 1971; State Answer ¶ 20.)

48. Fair hearings on all issues of fact are made available by the New York State Department of Labor, Division of Employment to all non-Federal employees and to other persons who are dissatisfied with an initial determination of a claim for benefits. (New York Labor Law § 620.)

49. In the UCFE Program in the State of New York for the year 1971, there were 8,184 original claims for benefits under the Regular Program (excluding Extended benefits) by former Federal employees of these original claims there were 5,276 non-monetary determinations and redeterminations of *ineligibility* for benefits. (64.7% of all original claims were denied.) Of the claims denied, 1,952 were for reasons of voluntary quit without

good cause, and 96 were for misconduct. (Stipulation attached as Exhibit A to Plaintiffs' Class Action Motion.)

Dated: April 14, 1972
New York, New York

Respectfully submitted,

[Attorneys and Addresses Omitted]

Attorneys for Plaintiffs

[Caption and Title Omitted]

FEDERAL DEFENDANTS' NOTICE OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT—Filed May 12, 1972

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit, statement pursuant to Rule 9(g), and memorandum of law, the undersigned will move this Court, at a motion part thereof, held in Room 506, United States Courthouse, Foley Square, New York, New York, on the 23rd day of May, 1972 at 10:00 A.M. or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure to dismiss this action, or, in the alternative, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to the federal defendants named in plaintiffs' amended complaint, and such other and further relief as may be deemed just and equitable.

Dated: New York, New York
May 12, 1972

Yours, etc.

[Attorneys and Addresses Omitted]

United States Attorney for the
Southern District of New York

TO:

DENNIS R. YEAGER, ESQ.
E. RICHARD LARSON, ESQ.
423 W. 118th Street
New York, New York 10027

LOUIS J. LEFKOWITZ
BRENDA SOLOFF
80 Centre Street
New York, New York 10013

[Caption and Title Omitted]

STATEMENT OF MATERIAL FACTS AS TO WHICH THE FEDERAL DEFENDANTS CONTEND THERE IS NO GENUINE ISSUE TO BE TRIED

1. The federal defendants accept and hereby incorporate the Statement of Material Facts submitted by the plaintiffs.

2. The plaintiffs, Christian and Green, were separated from federal employment pursuant to and in accordance with the provisions of 5 C.F.R. § 315.804.

Respectfully submitted,

[Attorneys Omitted]

United States Attorney for the
Southern District of New York

EXHIBIT B TO STATEMENT OF MATERIAL FACTS:
NOTICE OF SEPARATION TO VICTOR L. GREEN

December 14, 1971

PER:4
EG:lm

Mr. Victor L. Green
Customs Security Officer, GS-5

Dear Mr. Green:

This letter constitutes a notice to you that you will be separated from the Customs Service on December 18, 1971, in accordance with Part 315 of the Civil Service Regulations for disqualification during your probationary period, for the following reasons:

You were assigned for duty on Tokyo flight Northwest Airlines 21 and 22 from August 28 to September 1, 1971. Prior to reporting for duty at approximately 1:00 a.m., on August 28, 1971, you were observed in an intoxicated condition at the pool of your apartment, the Skylark Apartments. Although the swimming pool at the apartments closed at 10:00 p.m., you jumped the fence surrounding it, yelling and shouting and then jumped into the pool wearing only your jockey shorts. When the manager appeared and requested you to leave, you began screaming at him.

In addition, during the Tokyo flight Northwest Airlines 21 and 22 you had difficulty staying awake because of your personal activities prior to departure.

A few hours prior to leaving on a Tokyo flight on September 3, 1971, you also drank an alcoholic beverage.

Your drinking an alcoholic beverage within 24 hours of departure on assignments was contrary to instructions given to Customs Security Officers. In addi-

tion, your actions were disgraceful, and demonstrated a lack of responsibility and dependability.

Within 15 calendar days from the effective date of this action, you may appeal this decision to terminate your appointment to the Regional Director, New York Region, U.S. Civil Service Commission, Federal Building, 26 Federal Plaza, New York, N.Y. 10007. Your appeal may be based on the grounds that the action was taken because of political reasons not required by statute, or that it resulted from discrimination because of race, color, religion, sex, national origin, marital status or physical handicap. If you allege discrimination, you must submit an affidavit stating your reasons for believing there was such discrimination.

If you desire further information on how to proceed with your appeal, you may contact Mr. E. Grossi, Employee Relations Specialist, telephone number (212) 264-5173/5174, Room 726, U.S. Customhouse, New York, New York 10004, for further explanation.

Please sign, date and return the accompanying copy of this notice, so that it may serve as your acknowledgement of the original.

Very truly yours,

JOHN W. FALLON
Special Agent in Charge

EXHIBIT C TO STATEMENT OF MATERIAL FACTS:
UNITED STATES CIVIL SERVICE COMMISSION
DENIAL OF APPEAL TO VICTOR L. GREEN

UNITED STATES CIVIL SERVICE COMMISSION

NEW YORK REGION

Comprising New York, New Jersey,
Puerto Rico and the Virgin Islands

Office of the Director, New York, New York 10007

Director New York Region
U.S. Civil Service Commission
Federal Building
26 Federal Plaza
New York, N.Y. 10007

In Reply Please
Refer To
NY:A:BG:js

Mr. Victor L. Green
c/o Morrisania Legal Services
1438 Boston Road
Bronx, New York 10460

Dear Mr. Green:

Reference is made to your and your representative's letters of December 30, 1971 and January 18, 1972 concerning your recent employment with U.S. Bureau of Customs, New York, New York.

Our inquiry disclosed that you were notified by letter, dated December 14, 1971, signed by John W. Fallon, Special Agent in Charge, that you would be separated from your position of Customs Security Officer GS-5 because of drinking an alcoholic beverage within 24 hours of departure on assignments, etc. Accordingly, your services were terminated effective December 18, 1971.

Section 315.804 of the Civil Service Regulations applies to the action taken in your case. It provides that if an agency decides to terminate an employee serving a probationary period because his work performance or conduct fails to demonstrate his fitness or qualifications for continued federal employment, his services will be terminated by notifying him in writing as to why he is being terminated and the effective date of the action. This

regulation does not provide for any appeal to the Civil Service Commission by a probationary employee on the basis of his inadequate performance or conduct on the job.

After carefully considering all the pertinent information of record in your case, we find that the action taken by your agency is not within the purview of the Civil Service Commission's appellate jurisdiction. It is noted in your letter you state that the grounds upon which you are appealing is that the charges which formed the basis of the dismissal are wholly false and untrue; however, as to the merits of your case, we have previously indicated that they are not subject to review by the Civil Service Commission. In view of the above, your appeal cannot be accepted.

Unless this decision is further appealed within 15 days of the date it is received, it becomes the final decision of the Civil Service Commission.

Two copies of any further appeal should be addressed to the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415. Any representations which the Board should consider beyond those now in the appeal file must be submitted in writing. Please send two copies. In addition, notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board.

FOR THE REGIONAL DIRECTOR

Sincerely yours,

BERT GANSER
Appeals Examiner

cc:
Mr. Eric Rundbaken
Morrisania Legal Services
1433 Boston Road
Bronx, New York 10460

Special Agent in Charge
Department of Treasury
Bureau of Customs
New York, New York 10014

[Caption and Title Omitted]

ANSWER OF FEDERAL DEFENDANTS DEPARTMENT OF THE TREASURY AND JOHN CONNALLY TO THE AMENDED COMPLAINT—Filed May 16, 1972

The defendants, the United States Department of the Treasury and John Connolly, by their attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York for their answer to the complaint as amended:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the complaint, except deny the allegations insofar as they purport to state a rule of law respecting the requirement of providing a fair hearing.

2. Deny the allegations contained in paragraph 2 of the complaint.

3. Admit the allegations of the first sentence of Paragraph 3 of the complaint and deny the allegations of the second sentence.

4. Admit the allegation of the first sentence and deny knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of Paragraph 4 of the complaint.

5. Admit the allegations of Paragraph 5 of the complaint except deny that the statutes referred to deny a fair hearing as alleged.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the complaint.

7. Admit the allegations of Paragraph 7 of the complaint except deny those allegations that refer to a denial of a right to a fair hearing.

8-16. Admit the allegations of Paragraphs 8 through and including Paragraph 16 of the complaint.

17. Deny the allegations contained in Paragraph 17 of the complaint, except state that plaintiffs Christian and Green are former federal employees.

18. Admit the allegations of Paragraph 18 of the complaint.

19-20. Deny the allegations of Paragraphs 19 and 20 of the complaint, and state that plaintiff Christian was discharged by reason of her total record of unsatisfactory conduct of which the instances mentioned in Paragraphs 19 and 20 were a part.

21-22. Admit the allegations of Paragraphs 21 and 22 of the complaint.

23. Deny the allegations of Paragraph 23 of the complaint, except deny knowledge and information sufficient to form a belief as to what the basis of the initial determination was.

24-28. Admit the allegations of Paragraphs 24 through and including Paragraph 28.

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29 of the complaint.

30. Admit the allegations of Paragraph 30 of the complaint.

31. Admit the allegations of Paragraph 31 of the complaint, but state further that plaintiff never requested a hearing.

32-34. Admit the allegations of Paragraphs 32 through and including Paragraph 34 of the complaint.

35-36. Admit the allegations of Paragraphs 35 through and including Paragraph 36 of the complaint.

37. Admit the allegations of Paragraph 37 and state that further instances of misconduct were reasons for the discharge of Green.

38-39. Admit the allegations of Paragraphs 38 through and including Paragraph 39 of the complaint.

40. Admit the allegations of Paragraph 40 and state that further instances of misconduct were reasons for the discharge of Green.

41. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 41 of the complaint.

42-44. Admit the allegations of Paragraphs 42 through and including Paragraph 44 except state plaintiffs apparently mean the Department of the Treasury in the fourth line of Paragraph 43.

45. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 45 of the complaint.

46-50. Deny the allegations of Paragraph 46 through and including Paragraph 50 of the complaint.

First Affirmative Defense

51. This Court lacks jurisdiction over the subject matter of this action.

Second Affirmative Defense

52. The complaint fails to state a cause of action upon which relief may be granted.

Third Affirmative Defense

53. State that plaintiffs were dismissed from probationary federal employment for cause.

WHEREFORE, defendants demand judgment dismissing this action together with the costs and disbursements of this action, and such other and further relief as this court deems justified.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for defendants United States Postal Service Corporation, Klassen, United States Labor Department, Hodgson, United States Civil Service Commission, Hampton, Johnson, and Spain, United States Department of the Treasury, and John Connolly

By: /s/ Taggart D. Adams
TAGGART D. ADAMS
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: (212) 264-6335

[Caption and Title Omitted]

ORDER CONVENING THREE-JUDGE COURT
—Filed May 24, 1972

It appearing that on May 24, 1972, the undersigned referred this cause to the Chief Judge of the Circuit for the convening of a court of three judges pursuant to Title 28 U.S.C. §§ 2282 and 2284;

It further appearing that by an order dated May 24, 1972, of Hon. Henry J. Friendly, Chief Judge of the United States Court of Appeals for the Second Circuit, Hon. Paul R. Hays, United States Circuit Judge, Hon. Arnold Bauman, United States District Judge, and the undersigned were designated to hear and determine said cause; it is hereby

ORDERED that a hearing of the pending motions before the aforesaid three Judges shall be held at 10:30 A.M. on June 8, 1972, in Room 906, United States Courthouse, Foley Square, New York, New York; and it is further

ORDERED that counsel for each party, in addition to making timely service of papers to be considered by the court, is required to arrange that a set of legible copies of all papers thus served and filed shall be delivered to the chambers of each of the aforesaid three Judges not later than 1:00 P.M., on June 5, 1972.

Dated: New York, New York
May 24, 1972

/s/ Marvin E. Frankel
U.S.D.J.

[Caption and Title Omitted]

STATUTORY NOTICE OF THREE-JUDGE COURT
—Filed May 25, 1972

SIRS:

Pursuant to the provisions of Title 28, United States Code, Sections 2282 and 2284, you are hereby notified that by an order dated May 24, 1972, made by the Honorable Marvin E. Frankel, a hearing has been set by a three-judge court composed of the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Marvin E. Frankel and Honorable Arnold Bauman, United States District Judges, for the 8th day of June, 1972, at 10:30 A.M. in Courtroom 906, United States Courthouse, Foley Square, New York, New York.

Counsel are directed to comply with the provisions of General Rule 25 of this Court and with the provisions contained in the order dated May 24, 1972, signed by the

Honorable Marvin E. Frankel, a copy of which order is hereto annexed.

Dated: New York, New York
May 25, 1972

/s/ John Livingston
Clerk

TO: Attorney for Plaintiff

DENNIS R. YEAGER and
E. RICHARD LARSON
423 West 118th St.
New York, NY 10027

Attorneys for Defendants

HON. LOUIS J. LEFKOWITZ (for
N.Y. State Dep't. of Labor &
Louis L. Levine)
SAMUEL A. HIRSCHOWITZ and
BRENDA SOLOFF, of Counsel
80 Centre St., NYC 10013

WHITNEY NORTH SEYMOUR, JR. (for
Federal Defendants)
TAGGART D. ADAMS, of Counsel
U.S. Courthouse
Foley Square, NYC 10007

Attorney General of the United States
Department of Justice
Washington, D.C.

HON. NELSON A. ROCKEFELLER
Governor of the State of N.Y.
Executive Mansion, Albany, N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 5556

(Three Judge Court)

JEAN CHRISTIAN and VICTOR L. GREEN, individually and on behalf of all others similarly situated, PLAINTIFFS

—against—

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT; its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, JAMES D. HODGSON; UNITED STATES POSTAL SERVICE CORPORATION; its Post-Master General, ELMER T. KLASSEN; UNITED STATES CIVIL SERVICE COMMISSION; its Chairman, ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, JOHN CONNALLY, DEFENDANTS

BEDFORD-STUYVESANT COMMUNITY LEGAL SERVICES CORP., by Ruth Balen, Esq.; BRONX LEGAL SERVICES CORPORATION A, by Eric Rundbaken, Esq.; and Dennis R. Yeager, Esq. and E. Richard Larson, Esq., Attorneys for Plaintiffs.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, by Samuel A. Hirshowitz and Brenda Soloff, Assistant Attorneys General, for Defendants New York State Department of Labor and Louis L. Levine.

WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York, by Taggart T. Adams, Assistant United States Attorney, for Federal Defendants.

Before HAYS, C.J., FRANKEL and BAUMAN, D.J.

OPINION—Filed July 24, 1972

BAUMAN, D.J.

This action tests the constitutionality of the Federal statutory scheme providing unemployment compensation

benefits for former Federal employees as it is applied to those who at the time of termination of their Federal employment were in a probationary status. The principal issue is whether the provisions of 5 U.S.C. § 8506 [1] and the regulations promulgated thereunder, which make the findings of the former Federal employer as to the reasons for termination binding and conclusive upon the State agency in its determination of eligibility for unemployment compensation benefits, violate the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment.

This case came on before Judge Frankel for declaratory relief, injunctive relief and a writ of mandamus. As the constitutionality of a Federal statute was seriously in doubt, Judge Frankel invoked a Three-Judge Court pursuant to 28 U.S.C. § 2282.

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[1] 80 Stat. 589, 5 U.S.C. § 8506 provides in pertinent part:

"(a) Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

(1) whether or not the Federal employee has performed Federal service;

(2) the periods of Federal service;

(3) the amount of Federal wages; and

(4) the reasons for termination of Federal service.

The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provisions for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c) of this title."

I.

Plaintiff Jean Christian is a resident of Brooklyn, New York and a former employee of the United States Post Office[2] in Brooklyn. Plaintiff Victor L. Green is a resident of the Bronx, New York and a former employee of the United States Department of The Treasury, Bureau of Customs, based in New York. Both plaintiffs were probationary employees when their employment was terminated. Plaintiff Christian was employed by the Post Office Department from April 4, 1970 to October 2, 1970 and was discharged because of an unsatisfactory attendance record. Plaintiff Green was a sky marshal for the Bureau of Customs from December 24, 1970 to December 18, 1971, when he was discharged for drinking an alcoholic beverage within twenty-four hours of flying. Neither plaintiff was given a prior hearing nor was one required.

Title 5 U.S.C. § 8501 et seq.[3] authorizes the United

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[2] Defendant United States Postal Corporation assumed all the liabilities of the United States Post Office Department pursuant to 84 Stat. 738, 39 U.S.C. § 2002.

[3] 80 Stat. 586, amended 81 Stat. 218, 5 U.S.C. § 8502 provides in pertinent part:

"(a) The Secretary of Labor, on behalf of the United States, may enter into an agreement with a State, or with an agency administering the unemployment compensation law of a State, under which the State agency shall—

(1) pay, as agent of the United States, compensation under this subchapter to Federal employees; and

(2) otherwise cooperate with the Secretary and with other State agencies in paying compensation under this subchapter.

(b) The agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be paybale to him under the unemployment compensation law of the State if his Federal service and Federal wages assigned under section 8504 of this title to the State had been included as employment and wages under that State law.

(d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to

States Department of Labor to enter into agreements with State agencies to provide unemployment compensation for former Federal employees under the Unemployment Compensation for Federal Employees (UCFE) Program. Its statutory scheme includes a provision that the written statement of the former Federal employer as to the reasons for termination of an employee are binding and conclusive on the State agency which administers the UCFE program. 5 U.S.C. § 8506. Such an agreement was entered into by the Secretary of Labor and the State of New York. Both plaintiffs filed claims for unemployment compensation with the New York State Department of Labor which is the administering agency. After proceeding through the appropriate State procedures each plaintiff received a final determination denying them benefits based on the written, conclusive statements of their former Federal employers.

As probationary employees, neither plaintiff was entitled to a hearing before their Federal agency employer prior to termination of their employment.[4] Therefore, neither had an opportunity to contest, avoid or rebut the written reasons for their dismissal. Because the Federal findings were binding on the State agency, plaintiffs claim that they have been denied unemployment compensation benefits without due process of law and in violation of their rights to equal protection of the laws.

II.

Prior to addressing the constitutional questions, this Court must face the statutory claim[5] that the interpre-

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review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent."

[4] Compare 5 U.S.C. § 7532(c) with 5 C.F.R. §§ 315.804, 315.805, 315.806.

[5] The Supreme Court in *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970) stated that a three judge court should consider any statutory claim prior to considering the constitutional claim. See also *King* v. *Smith*, 392 U.S. 309 (1968).

tation of 5 U.S.C. § 8506 set forth in *Smith* v. *District Unemployment Compensation Board*, 435 F.2d 433 (D.C. 1970) is the correct one. If that is so, mandamus will lie against the Federal officials directing them to provide a hearing regarding the reasons for termination, upon request, to those probationary employees whose employment with a Federal agency is ended.

We refuse to follow the construction of 5 U.S.C. § 8506 set forth in *Smith*, supra. That Court found—

> "There is no reasonable basis for supposing that whereas Congress deliberately insisted on opportunity of hearing for employees generally, it deliberately established a no-hearing enclave for a relatively small group of Federal employees . . . ." *Supra* at 438.

In reaching that conclusion, we think that the Court ignored the structure of the Federal Civil Service Laws. Since the original Civil Service Act of 1883, Congress has made a distinction between probationary and permanent Government employees.[6] Probationary employees are not entitled to the full range of hearing rights to which permanent employees are entitled upon dismissal.[7] This distinction between probationary and permanent Government employees has been recognized by the Courts on many occasions[8] and Congress surely was aware of it in 1954 when it passed the legislation creating the UCFE Program.

Certainly the Congress intended that Federal employers should have an unfettered right to terminate probationary employees up to the time such employees acquire permanent status. No termination hearing is prescribed or required nor should it be. What *Smith*, supra, attempts is to legislate judicially a hearing not now required by statute which would mandate precisely the type of hearing not now required for discharge. Such a hearing, as

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[6] 5 U.S.C. § 3321.

[7] See footnote 4, supra.

[8] See, e.g., *Jaeger* v. *Freeman*, 410 F.2d 528 (5th Cir. 1969), *Medoff* v. *Freeman*, 362 F.2d 472 (1st Cir. 1966).

a practical matter, would limit the Government in the discharge of probationary employees to an extent never previously contemplated by the Congress.

Additionally, the idea that the use of the word "findings" in 5 U.S.C. § 8506 means "findings after a hearing" is a tortured, strained and unnecessary interpretation. We hold that the word "findings" in 5 U.S.C. § 8506 means only the written statement of reasons for termination sent by the Federal employer to the State agency administering the UCFE program. Had the Congress meant otherwise it would have said so.

III.

Having disposed of the statutory claim, the Court must now proceed to the constitutional claims. In this connection, defendants have interposed the threshhold defense of lack of subject matter jurisdiction and in the case of the Federal defendants must be sustained.

The only statutory basis for jurisdiction over the dispute between the plaintiffs and the Federal defendants alleged in the complaint is 28 U.S.C. § 1361, the mandamus remedy, which has been found lacking in merit, supra.

In their complaint plaintiffs have not met the jurisdictional requirements under 28 U.S.C. §§ 1331, 1337 or 1346, the so-called "federal question" jurisdiction sections. As neither the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, nor the provisions for invoking a Three-Judge Court, 28 U.S.C. § 2282, provide subject matter jurisdiction in and of themselves, an additional statutory basis must be alleged. There are no such allegations. The so-called "civil rights" jurisdictional provisions, 42 U.S.C. § 1983 and 28 U.S.C. § 1343, apply to State, not Federal officials.

However, the situation is different as to the State defendants. Plaintiffs have properly based their claim on 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The gist of the complaint against the State defendants is that their application of the Federal law in administering the UCFE

program has denied the plaintiffs of unemployment compensation benefits without due process of law and in violation of their right to equal protection of the laws.

Ayala v. *District 60 School Board*, 327 F.Supp. 980 (D. Colo. 1971) illuminates the issue. As the Court there said (at p. 981):

> "Since plaintiffs in this action claim that their right to equal protection of the laws has been denied by Colorado officials, acting in their capacities as officials, this court clearly has jurisdiction to hear the constitutional claim and, should plaintiffs be successful, to grant the relief sought. It makes no difference that plaintiffs have not cited a state or local law upon which the defendants' conduct may be based. It is settled that the phrase 'under color of' comprehends all official behavior, even that which is patently unlawful under state, as well as federal, law."

IV.

The State defendants assert that the alleged constitutional violations claimed by plaintiffs do not state a claim upon which relief can be granted. We agree.

Plaintiffs urge that the State defendants, in applying 5 U.S.C. § 8506 to deny them unemployment compensation benefits without a hearing, have violated the equal protection clause of the Fourteenth Amendment. That violation allegedly results from treatment of former probationary employees in a discriminatory and irrational manner from all other applicants for unemployment compensation.

To reiterate what we have previously stated, Congress had good reason to differentiate between probationary and permanent employees in trying to promote the efficient disposition of Federal business. As the purpose of such classification was legitimate and the means adopted by Congress were rational, there is no denial of equal protection. Cf. *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

The other constitutional issue is whether a denial of unemployment compensation benefits without a hearing violates the due process clause of the Fourteenth Amendment. This depends upon striking a balance between the loss to the claimant resulting from a denial of such a hearing and the Government's interest in summary adjudication of claims. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In *Goldberg*, supra, the Supreme Court held that an evidentiary hearing was required before welfare payments could be terminated, but the factual distinctions between *Goldberg* and the case at bar highlight the conclusion that the Government's interest in summary adjudication outweighs plaintiffs' need for a hearing here.

Welfare programs, such as aid to families with dependent children,[9] are designed to meet a different need than unemployment compensation. Such payments are designed to provide the recipient with essential food, clothing and shelter. *Goldberg*, supra, at 264. Need is *not* the criterion for eligibility under the unemployment compensation programs.[10] Compensation is available as a matter of right to involuntarily unemployed workers and benefits are based on wages previously received by the claimant without relation to need. In fact, if an unemployed person is declared ineligible for unemployment compensation benefits he may nonetheless qualify for welfare payments on the basis of his need. The plain fact is that unemployment compensation benefits are not of the same urgent nature to the survival of the claimant as are welfare benefits.

Goldberg, supra, also holds that recipients *already receiving* benefits were entitled to a hearing before termination of those benefits. In the case at bar plaintiffs have not received benefits but have only applied for them. In fact, a three-Judge panel of this Court has held that the suspension or termination without a prior hearing of *unemployment compensation benefits* already being paid

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[9] 49 Stat. 627, as amended, 42 U.S.C. §§ 601-610.

[10] See N.Y. Labor Law §§ 590, 591 (McKinney's 1972 Supp.) which sets forth the rights and eligibility requirements for unemployment compensation in New York.

without a prior hearing is not violative of the Fourteenth Amendment. *Torres* v. *New York State Department of Labor*, 321 F.Supp. 432 (S.D.N.Y. 1971), *vacated and remanded*, 402 U.S. 968 (1971), *previous decision adhered to*, 333 F.Supp. 341 (S.D.N.Y. 1971). That Court pointed out that the "brutal need" of the welfare recipients in *Goldberg* was not present in circumstances involving recipients of unemployment compensation. The same Government interests of an orderly and summary procedure for the efficient operation of the unemployment compensation program which were present in *Torres*, are present here. On balance, the interests of the Government outweigh plaintiffs' need for a hearing and so, the due process claim cannot be sustained.

Given the above disposition of the case it is not necessary to reach a decision as to whether plaintiffs' suit is properly brought as a class action. The action is dismissed.

SO ORDERED.

Dated: July 24, 1972

/s/ Arnold Bauman
U.S.D.J.

/s/ Paul R. Hays
U.S.C.J.

U.S.D.J.

FRANKEL, D.J. (dissenting):

My difference with the majority is not on the questions of constitutional law, which I would not reach. Instead, on grounds like those set out in *Smith* v. *District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), I would hold as a matter of statutory construction that the plaintiffs and other federal probationary employees like them are entitled to at least a rudimentary hearing somewhere on "findings" asserted to bar their claims for unemployment compensation.

Dealing as we do here with related statutes enacted at widely separate times, our problem is one on which differences respecting general principles of interpretation may be decisive. Such statutes, though intended to be interconnected, often fail to mesh with automatic precision. The same words or phrases may take varied colors from their varying contexts. Words defining classes of people or things may later need expansive readings to avoid omissions that must fairly be deemed inadvertent, cf. *Flora* v. *United States*, 362 U.S. 145 (1960), or constricted interpretations to avoid a literally required inclusion offensive to informed reason and good sense, cf. *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). The administration of such measures for the faithful implementation of legislative purposes is among the more challenging and creative of the tasks entrusted to judges. There is no formula that tells how much of literalism and how much of other things may be required for the particular case. The work calls truly for judgment in a field that has fairly been described as being "not a science but an art."[1]

In the instant case, though most respectfully, I think the majority has followed literal meaning and syntax to the point of mistakenly sacrificing goals dominant in the statutory scheme. Specifically, today's decision excludes a small group of federal employees from the basic right to be heard when (1) Congress evidenced its ex-

[1] Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259 (1947).

press purpose to make that right available to all employees, private or public, (2) Congress likewise evinced the aim of avoiding second-class citizenship for federal employees with respect to the elemental need for a dignified form of wage substitute in times of unemployment, (3) the great bulk of federal employees are in fact upon a substantial par with private workers in having an opportunity to contest factual determinations which, if adverse, may preclude unemployment compensation, (4) the deprived group, probationary employees, appears not to have been specially noticed during the legislative process, and certainly not to have been singled out for the special deprivation to which it is today held subject, and (5) the opposite result from the majority's, more consonant with the deep commitment of our jurisprudence to fair hearings as prerequisites to adverse determinations, is readily reconcilable with the text and essential objects of the pertinent statutory provisions. These thoughts are elaborated in what follows.

(1) From the inception of the federal legislation for federal funding, and limited federal supervision, of state unemployment compensation programs, one of the few requirements binding the States was that their laws include provision for

> "[o]pportunity for a fair hearing before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied * * *." Social Security Act of 1935, § 303(a)(3), 49 Stat. 626, 42 U.S.C. § 503(a)(3).

At the time of that enactment, almost 40 years ago, our notions of fair procedure embraced a far less sweeping insistence upon the right to be heard than is prevalent today. The emphasis in the statute, moreover, was on broad latitude for state legislative preferences in "all matters in which uniformity is not absolutely essential."[2] Even in those circumstances, the right of a "fair hearing" was enshrined as a requisite of suitably "high

[2] Message of the President, Jan. 17, 1935, H.Doc. No. 81, 74th Cong., 1st Sess., p. 16.

administrative standards"[3] for the envisioned state unemployment compensation programs.

(2) Almost 20 years after providing for workers in private industry, the Congress created the program of unemployment compensation for federal employees, out of which the present case arises. An obvious and explicit impulse, if somewhat belatedly followed, was the concern for elementary fairness. "[T]he Federal Government should not be in the position of providing less favorable conditions of employment than are required of private employers."[4] For federal as well as private employees, under either of the alternative plans Congress provided, an employee denied compensation was (and is) to be given a "fair hearing." 5 U.S.C. §§ 8502(b), 8503(c).

We come, however, to 5 U.S.C. § 8506(a), upon which the present controversy centers. As set out in Judge Bauman's opinion for the court, the "findings" there designated, including those concerning "the reasons for termination of Federal service," are declared to be "final and conclusive for the purpose of sections 8520(d) and 8503(c) * * *." The question before us is whether adverse "findings" which may operate to bar unemployment compensation are thus foreclosed from inquiry anywhere for the narrow group of employees who have never had any opportunity to contest them.[5]

(3) When Congress wrote the provisions before us for "federal employees," it drew no distinction between per-

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[3] *Id.* at 4.

[4] S. Rep. No. 1794, 83d Cong., 2d Sess., in 3 U.S. Code, Cong. & Ad. News 3891, 3894 (1954).

[5] More precisely, plaintiff Jean Christian did have a hearing before a state hearing officer, and she prevailed—i.e, the reason asserted for her dismissal (and denial of unemployment compensation) was determined upon airing to be unfounded. In the view now sustained by a majority of this court, however the hearing officer was held on an administrative review to have erred in hearing Miss Christian at all, and the denial of compensation payments was held to follow from the untested "finding" of the federal employer.

manent and probationary workers. Neither the statute nor its history suggests that anyone had such a distinction, or its possible consequences, in mind.[6] The great majority of federal employees are, of course, those in the permanent category. The prototypical civil servant, the one we are likely to envision when thinking in the global concepts of legislators, is in this group. Given that reality, and given the familiar procedures governing the separation of permanent civil servants, it is reasonable to infer that the "findings" declared "final and conclusive" were conceived as those affecting, and resulting from procedures affecting, permanent civil servants.

The very word "findings" buttresses this inference. If it is not inescapably true, the word commonly refers to resolutions or determinations following deliberations upon evidence in a manner of which the judicial process is the ideal case. See Black's Law Dictionary 758 (4th ed. 1957), citing cases. If the probable image is not always of a full-scale trial "hearing," it is certainly not of the simple assertion of a "fact" or merely "the conclusory statement of a result" where there has been no opportunity for countervailing presentations and no pretense of considering two sides. *Coleman* v. *Brucker*, 257 F.2d 661, 662-663 (D.C. Cir. 1958); *Sims* v. *Greene*, 161 F.2d 87, 89 (3d Cir. 1947). And if the word "findings" means anything more than such untested declarations, it was an apt term for permanent civil servants, but not apt at all for probationary people.

For decades before the enactment of UCFE in 1954, permanent civil servants had a right to contest, and to make presentations opposing, grounds asserted for their dismissal. While the Lloyd-LaFollette Act, August 24,

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[6] I am a long way from sharing the confidence of the majority that Congress "surely was aware" of this distinction at the time of the passage of the UCFE. It is always a risky business to detect sure awareness in a busy Congress where the subject appears never to have been mentioned. The assumption would be arguable if the UCFE legislation had been under the charge of the committee in either house concerned with civil service affairs. That was not the case, however; the responsible committees handling UCFE were House Ways and Means and Senate Finance.

1912, § 6, 37 Stat. 555, as amended, 5 U.S.C. § 7501(b), gave (and gives) no full-scale trial hearing, it required notice and charges in writing, a reasonable time to answer in writing, opportunity to file affidavits and at least an opportunity to seek discretionary grant of a hearing. Executive regulations implementing these rights have continued to expand them. Without tracking every detail, there was a right in 1954 (when the UCFE was enacted) to a written decision stating "the reasons for the action taken and its effective date." 5 C.F.R. § 9.102 (a)(1) (1949). Beginning in 1962, with Executive Order No. 10987, 27 F.R. 550 (Jan. 18, 1962), permanent employees have had a right to a full "hearing" to contest dismissals, either at the agency stage or on appeal. See 5 C.F.R. § 771.101 *et seq.* (1972).

(4) Thus, for the overwhelming majority of federal employees, those in the permanent service, the findings declared "final and conclusive" under § 8506(a) have at all times been reached after at least some opportunity for contest. No such opportunity has existed at any time for the probationary employee. Our question is whether plain language or anything else compels the harsh result of denying such an employee unemployment compensation (no question is raised as to the finality of his federal termination) on grounds he has never had a chance to refute.

It is not possible to say with assurance that the "plain language" of § 8506(a) requires a decision against the plaintiffs. The term "findings" fits at best crudely the ex parte declarations upon which plaintiffs were dismissed. But, neatly or not, the word does fit. If textual analysis were the whole of our responsibility, plaintiffs would probably deserve to lose. However, almost everything else germane to our problem points the other way.

(5) The strikingly inferior position to which plaintiffs have thus far been relegated for unemployment compensation purposes was never decreed—and seems never to have been considered as a prospect—by the Congress. The explicit purpose of putting public and private employees on a par applies at least as much to probationary workers (whose employment is more pre-

carious) as to permanent workers for purposes of insurance against unemployment. The powerful impetus in our law favoring the right to be heard weights against the denial of such a right said to be required by a semantic analysis so rickety as that erected upon the word "findings" in the present context. The concern for "uniformity" of federal "findings," which appears to have prompted the finality provision, is scarcely grazed by allowing a state hearing officer to find out with some decent measure of reliability whether (solely for unemployment compensation purposes) the federal probationary employee in fact drank when he should not have or was improperly absent without reporting.[7]

The arguments against the majority's conclusion acquire at least some modest support from the constitutional arguments that gave birth to this three-judge court. Though the arguments are today rejected, neither of my distinguished brethren suggests that the issues thus decided lack substance. Thus, the construction I would adopt has the merit of avoiding constitutional doubt. *United States* v. *Thirty Seven Photographs*, 402 U.S. 363, 369 (1970); *Schneider* v. *Rusk*, 390 U.S. 17, 27 (1968); *United States* v. *Rumely*, 345 U.S. 41, 45

[7] The majority says a hearing solely for unemployment compensation purposes "as a practical matter, would limit the Government in the discharge of probationary employees to an extent never previously contemplated by Congress." It should be stressed, therefore, that nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation. When the majority speaks of what is foreseen "as a practical matter," it evidently reflects the concern, exhibited in arguments to us for defendants, that the prospect of a hearing—even though not testing the discharge or capable of doing so—would make supervisors in the employing agencies timorous about discharging probationary people. This is a regrettable position. Insofar as it is accurate, it portrays a regrettable situation. We ought not to be so "practical" that we fashion legal judgments upon the premise that federal officials commonly fire people upon grounds so tenuous that they would not dare order the firings if they thought someone, somewhere else, without authority to reverse the firings, might so much as air the asserted grounds.

(1953). More specifically, it is pertinent to recall analogous areas where the Supreme Court has avoided constitutional doubt by discovering upon analysis that the word "final" in a statute should not always be construed to foreclose further review of a disputed question. *Estep* v. *United States*, 327 U.S. 114, 122, 127-28 (1945); *Chin Yow* v. *United States*, 208 U.S. 8 (1908) (Holmes, J.)

Finally, it is worth stressing that we deal with a class of necessitous people claiming the benefits of broadly remedial legislation. If there is doubt about the statutory meaning—and I urge at least that, recalling, *inter alia*, a unanimous D.C. Circuit ruling in conflict with the present majority—it ought to be resolved with liability toward those for whom the benefit was created. Cf. *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932); *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *United States* v. *Udy*, 381 F.2d 455, 456 (10th Cir. 1967); *Phoenix Assurance Co. of N.Y.* v. *Britton*, 289 F.2d 784, 786 (D.C. Cir. 1961). See also *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200 (1952).

I would grant judgment for the plaintiffs sustaining their right to a "fair hearing," like the right of private compensation claimants, unless they are offered a prompt hearing, only for purposes of compensation, by the federal agencies in which they were formerly employed. Cf. *Smith* v. *District Unemployment Compensation Board*, *supra*, 435 F.2d at 438-39.

/s/ Marvin E. Frankel
MARVIN E. FRANKEL
U.S.D.J.

[Caption and Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 30, 1972

Notice is hereby given that Jean Christian and Victor L. Green, the Plaintiffs in the above-entitled action, hereby appeal to the Supreme Court of the United States from the final order, entered in this action on July 24, 1972, denying Plaintiffs' requested relief and dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
September 12, 1972

[Attorneys and Addresses Omitted]

Attorneys for the Plaintiffs

SUPREME COURT OF THE UNITED STATES

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN, APPELLANTS

v.

NEW YORK STATE DEPARTMENT OF LABOR,
DIVISION OF EMPLOYMENT, ET AL.

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 16, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN, APPELLANTS

v.

NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT, ET AL.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 16, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,

Appellants,

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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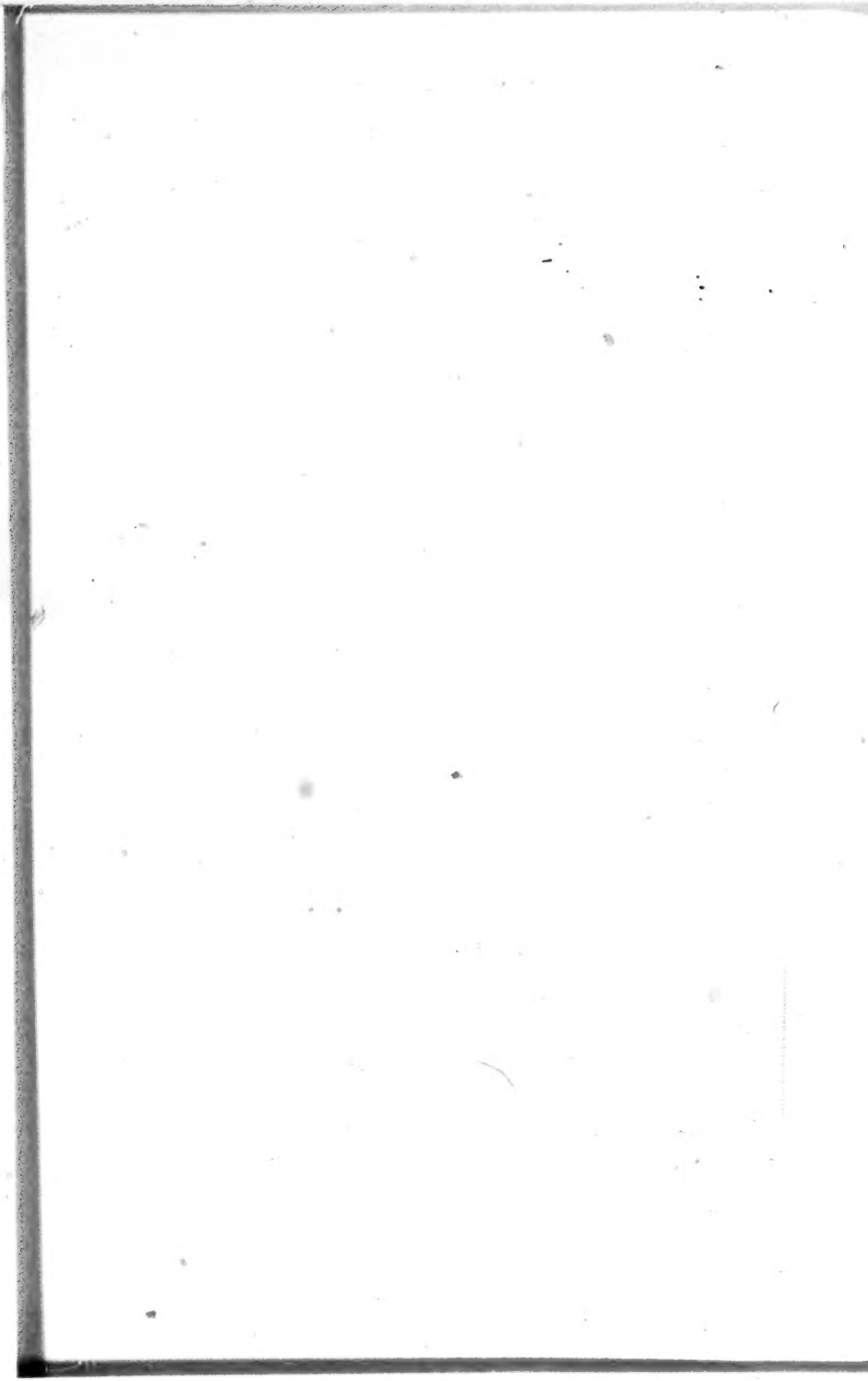

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,

Appellants,

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

OPINIONS BELOW

The majority and dissenting opinions of the United States District Court for the Southern District of New York are reported at 347 F.Supp. 1158 (S.D.N.Y. 1972),

and appear in the Appendix at A. 62-77.[1] Because of the differences between the majority opinion of record and the majority opinion as subsequently reported, the appellants, when referring to either the majority or dissenting opinions, will refer only to the opinions of record as they appear in the Appendix at A. 62-77.

JURISDICTION

This Court's jurisdiction rests upon 28 U.S.C. §1253, which confers jurisdiction over this direct appeal from the final judgment of a three-judge United States district court convened pursuant to 28 U.S.C. §§2282 and 2284.

The judgment of the three-judge United States District Court for the Southern District of New York was entered on July 24, 1972. Appellants' Jurisdictional Statement was filed on November 14, 1972, and probable jurisdiction was noted by this Court on April 16, 1973.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution, each of which is set forth, in relevant part, in Appendix A to this Brief. (Brief App. 1a).

This case also involves statutory provisions enacted as part of the Social Security Act providing for state-administered unemployment compensation programs, 42 U.S.C. §503(a)(1) & (3), and providing for the Unemployment Compensation for Federal Employees program,

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[1] Throughout this Brief, references to the printed Appendix will be cited as "A. ___." The occasional references to the Appendix to this Brief will be cited as "Brief App. ___."

5 U.S.C. §§8501-8508. These respective statutory provisions are set forth, in relevant part, in Appendix A to this Brief. (Brief App. 1a-6a).

This case also involves the federal regulations promulgated by the United States Secretary of Labor under the Unemployment Compensation for Federal Employees program, 20 C.F.R. §§601.1 *et seq.*, and it involves the New York Unemployment Insurance Law provision for a fair hearing, N.Y. Labor Law §620. These provisions are set forth, in relevant part, in Appendix A to this Brief. (Brief App. 6a-8a).

The case further involves the federal jurisdictional statutes, 28 U.S.C. §1343(3) and 28 U.S.C. §1361, which are set forth, in relevant part, in Appendix A to this Brief. (Brief App. 8a-9a).

QUESTIONS PRESENTED

Appellants Christian and Green, former federal probationary employees who did not resign, are unemployed workers covered by unemployment compensation under the Unemployment Compensation for Federal Employees program, 5 U.S.C. §§8501-8508. Pursuant to the appellees' interpretation and enforcement of 42 U.S.C. §§503(a)(1) & (3) and 5 U.S.C. §§8501-8508, appellants were disqualified from receiving their statutory entitlement to unemployment compensation on the basis of their former employers' *ex parte* reasons for termination of employment without being provided any opportunity for a fair hearing to contest those *ex parte* reasons. The questions presented, therefore, are:

A. Does the denial of a fair hearing to unemployed workers, concerning their disqualification from receiving unemployment compensation, violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution?

B. Does the denial of a fair hearing to former federal probationary employees who did not resign, concerning the reasons for termination of employment, when such a fair hearing is provided to all other employees covered by unemployment compensation, including permanent and probationary private employees, permanent and probationary state employees, permanent and probationary federal employees who resign and all permanent federal employees, discriminate unfairly in violation of the Due Process Clause of the Fifth Amendment to the Constitution and the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

C. Does the denial of a fair hearing to unemployed workers, concerning their disqualification from receiving unemployment compensation, violate the proper statutory construction of 42 U.S.C. §§503(a)(1) & (3) and 5 U.S.C. §§8501-8508?

D. Does a United States District Court have subject matter jurisdiction under 28 U.S.C. §1361 or 28 U.S.C. §1343(3) over federal officials to determine whether they have violated the Due Process Clause of the Fifth Amendment to the Constitution?

STATEMENT OF THE CASE

A. Statement of Facts

Appellants Jean Christian and Victor L. Green are unemployed workers covered by unemployment compensation under the Unemployment Compensation for Federal Employees program (hereafter sometimes "UCFE program"), 5 U.S.C. §§8501-8508. Both appellants sought to obtain their earned unemployment compensation, but their claims were denied solely on the basis of *ex parte* reasons for termination submitted to the New

York State Department of Labor by their former employers. (A. 42-47). Pursuant to the appellees' interpretation and enforcement of 5 U.S.C. §8506(a), a federal employer's *ex parte* reasons for termination of any federal probationary employee who did not resign, are final and unreviewable in the state fair hearing procedure required for unemployment compensation purposes by 42 U.S.C. §503(a) and 5 U.S.C. §§8501-8508. Since appellants Christian and Green had been federal probationary employees who did not resign, they were conclusively precluded, by the appellees' interpretation and enforcement of 5 U.S.C. §8506(a), from contesting or fairly establishing the reasons for termination for unemployment compensation purposes. (A. 42-47).

Appellant Jean Christian was an employee of the United States Post Office from April 4, 1970, to October 2, 1970, on which date her employment was terminated by the Post Office allegedly because of unsatisfactory conduct including an unsatisfactory attendance record. (A. 44). Appellant Victor L. Green was a skymarshall for the United States Department of Treasury, Bureau of Customs, from December 24, 1970, to December 18, 1971, on which date he was discharged allegedly for drinking an alcoholic beverage within twenty-four hours of flying. (A. 46, 52-53).

Both appellants were probationary employees during their periods of employment. (A. 44, 46). Pursuant to 5 C.F.R. §315.806, federal probationary employees have no right to appeal the reasons for termination and thus have no right to a termination hearing except in limited circumstances not applicable to this case. (A. 16, 30, 47, 54-55).

After the termination of their employment, each appellant filed a claim with the New York State Department of Labor for unemployment compensation under the Unemployment Compensation for Federal Employees program, 5 U.S.C. §§8501-8508. (A. 19, 31, 44). The New York State Department of Labor is the agency responsible for the administration of unemployment compensation in the State of New York, and, pursuant to an agreement[2] with the United States Department of Labor, the State Department of Labor also administers the payment of unemployment compensation to former federal employees under the UCFE program pursuant to state law. (A. 42). After the appellants had filed their claims for unemployment compensation, their former employers, the Post Office and the Department of the Treasury, submitted to the State Department of Labor *ex parte* reasons for the termination of appellants' employment. (A. 15, 29, 44). The State Department of Labor treats those reasons as final and conclusive. (A. 47-48). Consequently, appellants' claims for unemployment compensation were denied. (A. 44-46).

Pursuant to N.Y. Labor Law §620, persons who are dissatisfied with the result of an initial determination are entitled to a fair hearing before a referee.[3] (A. 48). Since

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[2]5 U.S.C. §8502 authorizes the United States Secretary of Labor to enter into an agreement with state unemployment agencies so as to provide for state administration of the UCFE program.

[3]This provision is mandated by §303(a) of the Social Security Act, 42 U.S.C. §503(a)(3), which requires all state unemployment compensation programs to make provision for:

> "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for benefits are denied."

the UCFE program in New York is administered by the State Department of Labor pursuant to state law (A. 42), former federal employees who are dissatisfied with the result of an initial determination are also entitled to this hearing procedure before a state referee. However, since the State Department of Labor treats the reasons for separation submitted by the federal employers as final and conclusive (A. 47), the required fair hearing is unavailable to former federal employees such as appellants. (A. 44-46).[4]

The effect of treating the federal reasons as final and conclusive is illustrated by appellant Christian's case. Appellant Christian was discharged by the Post Office allegedly because of unsatisfactory conduct, including an unsatisfactory attendance record. (A. 16, 44). In its initial determination, the New York State Department of Labor found as "final, conclusive and binding," the reasons for termination submitted by the Post Office, and therefore denied her claim for unemployment compensation on the ground that her unsatifactory attendance record required disqualification for voluntary leaving without good cause. (A. 19, 44). Appellant Christian then requested a hearing pursuant to N.Y. Labor Law §620. (A. 15-16). She appeared at that hearing and testified as to the reasons for her separation from the Post Office. (A. 16, 21). After hearing all of the facts presented on behalf of the Post Office and on behalf of appellant Christian at that hearing, the hearing referee, acting contrary to the appellees' interpretation of 5 U.S.C. §8506(a), found that appellant Christian's

[4] Although this required fair hearing is not available to former federal probationary employees who did not resign, such as appellants, a fair hearing is available to all other former employees, see pp. 12-13, 30-33, *infra*.

absences from employment were justified, that her employer was advised beforehand of her absences, that she thus did not voluntarily leave without good cause, and that she therefore was eligible for unemployment compensation. (A. 21-22, 45). The State Department of Labor, through its Industrial Commissioner, appealed the referee's decision to the New York State Unemployment Insurance Appeal Board on the ground that the referee did not treat the *ex parte* federal reasons for separation as final and conclusive as required by the appellees' interpretation of 5 U.S.C. §8506(a). (A. 23-25, 45). The Appeal Board reversed the referee's decision, stated that it was bound by the *ex parte* federal reasons, and thus denied appellant Christian her right to unemployment compensation. (A. 27-28, 45).

B. Statutory and Administrative Framework

As part of the Social Security Act of 1935, as amended, 42 U.S.C. §§501-503, 1101 *et seq.*, and through the Federal Unemployment Tax Act, as amended, 26 U.S.C. §§3301-3309, Congress encouraged the adoption of state-administered unemployment compensation programs by providing for various tax incentives and for the federal payment of state administrative costs.[5] In order to ensure fair and proper administration of the state programs, Congress also provided that certain

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[5]26 U.S.C. §§3302 & 3303 allow credits to be taken against federal taxes for contributions made to a state's unemployment fund, and 42 U.S.C. §1101(c)(1)(A) provides for the payment of state administrative costs.

For a general history of the federal and state development of unemployment compensation, see E. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21 (1945).

administrative requirements must be met by the states, 42 U.S.C. §§501-503. Among these provisions are the requirements for full payment of compensation when due and for a fair hearing:

> "The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . includes provision for –
>
> "(1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation when due; and
>
> * * * * *
>
> "(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(1) & (3)

The administrative procedures adopted by New York as part of its Unemployment Insurance Law, as amended, N.Y. Labor Law §§500 *et seq.*, generally conform to the aforementioned administrative procedures required by Congress. When a private or state employee has worked in covered employment[6] for a minimum period of time and has received a minimum amount of remuneration, that worker is generally "entitled" to compensation should he become unemployed. N.Y. Labor Law §590. If he becomes unemployed, the worker may file a claim for compensation with the State Department of Labor. N.Y. Labor Law §596. The State Department of Labor, through an impartial claims examiner, requests information from both the unemployed worker and the former employer, and, on the basis of the information received,

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[6]In New York, unemployment compensation covers not only private employment, N.Y. Labor Law §§512 and 560, but also state government employment, N.Y. Labor Law §§512, 560, 590.5.

the examiner makes an initial determination as to the eligibility of the worker. N.Y. Labor Law §597. If either the unemployed worker or the former employer is dissatisfied with this initial determination, a fair hearing may be requested before an impartial referee. N.Y. Labor Law §620. Since unemployed workers may be disqualified from receiving their earned compensation if they are voluntarily unemployed, N.Y. Labor Law §593,[7] the reasons for termination constitute one of the basic issues to be determined in this administrative procedure.[8] This basic administrative procedure is thus available to all private and state employees covered by unemployment compensation in New York.[9]

In 1954, Congress resolved that federal employees also should be covered by unemployment compensation. Reasoning that "[t]he Federal government should not be in the position of providing less favorable conditions

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[7]Pursuant to N.Y. Labor Law §593, a worker may be disqualified for "voluntary separation without good cause" or for "misconduct in connection with his employment."

[8]The importance of the reasons for termination in the unemployment compensation statutory scheme is reflected by the high percentage of appeals from initial determinations which concern disputed reasons for termination. During March, 1972, of the 4010 appeals taken to the hearing referee by the former employee or by the employer, 2506, or 62.4%, concerned issues of voluntary leaving without good cause or misconduct in connection with the worker's employment. New York State Department of Labor, *Operations*, Vol 34, No. 3, Table 17-A (March 1972). Similarly, in May, 1972, of the 3967 appeals taken to the hearing referee, 2471, or 62.2%, involved disputed issues of voluntary leaving or misconduct. New York State Department of Labor, *Operations*, Vol. 34, No. 5, Table 17-A (May 1972).

[9]This procedure generally parallels the administrative procedure described by this Court in *California Department of Human Resources Development v. Java*, 402 U.S. 121, 125-129 (1971).

of employment than are required of private employers,"[10] Congress amended the Social Security Act by adding the Unemployment Compensation for Federal Employees program. 5 U.S.C. §§8501-8508, formerly Title XV of the Social Security Act, §§1501-1510, 68 Stat. 1130 (1954).

Congress established two procedures for the administration of the UCFE program, one through the state unemployment compensation agencies and the other through the Secretary of Labor. 5 U.S.C. §§8502 and 8503. The first procedure, which applies where a state agrees with the Secretary of Labor to administer the program, 5 U.S.C. §8502(a), is applicable in New York. (A. 42). Under this procedure, federal services and wages are assigned to the state, 5 U.S.C. §8504, and the state is required to pay compensation to former federal employees as an "agent of the United States," 5 U.S.C. §8502(a)(1). Initial determinations as to eligibility for compensation are "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law." 5 U.S.C. §8502(d). And compensation is to be paid to federal employees "on the same terms, and subject to the same conditions as . . . under the unemployment compensation law of the State." 5 U.S.C. §8502(b).[11]

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[10] S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 7 (1954); see also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

[11] Pursuant to the second procedure, which applies to federal employment in those states which do not have an agreement with the Secretary of Labor, the Secretary is to administer the UCFE program for the federal employees in those states. 5 U.S.C. §8503. Just as the states are required to provide a fair hearing under 42 U.S.C. §503(a)(3), the Secretary is required to provide a "fair

In order to implement the UCFE program through the states, Congress authorized a procedure whereby the federal employing agencies would make available to the state unemployment compensation agencies, various information concerning former federal employees' services and wages. 5 U.S.C. §8506. Specifically, 5 U.S.C. §8506(a) provides:

> "The information shall include the findings of the employing agency concerning –
>
> * * * * *
>
> "(4) the reasons for termination of Federal service.
>
> "The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary [of Labor]. . . . Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c)."

Although it may appear from the statutory scheme that all covered federal employees, whatever their status, are to be paid compensation according to the same terms and conditions as are applicable under state law, this has not been the result. Pursuant to the Secretary of Labor's various interpretations of 5 U.S.C. §8506(a), the Secretary has provided different administrative procedures for three separate groups of federal employees.

One group of employees is composed of former federal probationary employees who did not resign, such as

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hearing" under 5 U.S.C. §8503(c). And, identical to the requirement which is imposed upon the states, the Secretary is required to pay compensation to former federal employees "on the same terms, and subject to the same conditions as . . . under the unemployment compensation law of the State." 5 U.S.C. §8503(a).

appellants Christian and Green. As to these employees, who may be separated without cause and who are not entitled to employment termination hearings,[12] the Secretary interprets the word "findings" in 5 U.S.C. §8506(a) to mean the *ex parte* reasons asserted by the former employer as the cause for separation from employment. Pursuant to this interpretation, the *ex parte* reasons are transmitted to the state where they are treated as final and unreviewable in the initial determination procedure as well as in the state fair hearing procedure.

A second group of employees, permanent and probationary employees who resign, is subject to a second interpretation of 5 U.S.C. §8506(a) by the Secretary. As to these employees, the Secretary interprets the word "findings" to mean determinations after a hearing. Pursuant to this interpretation, if there were no findings made as a result of a federal hearing, the information transmitted by the employer to the state is reviewable both on initial determination and in the state fair hearing; if, however, the worker had already been given a federal fair hearing, the impartially made findings are not reviewable by the state. 20 C.F.R. §609.18(a). The third group of employees, permanent federal employees, is subject to a similar interpretation of 5 U.S.C. §8506(a). Since all permanent federal employees are entitled to termination hearings,[13] the findings which are made as a result of those hearings are unreviewable by the state.[14]

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[12] See generally, 5 C.F.R. §§315.801-315.806.

[13] See generally, 5 C.F.R. §§752.201 *et seq.*, 771.101 *et seq.*, and 772.301 *et seq.*

[14] See generally United States Department of Labor Employment Security Manual, §6663 C.

C. Proceedings Below

On December 1, 1971, appellant Jean Christian commenced this action by filing a Complaint in the United States District Court for the Southern District of New York. (A. 1). On March 10, 1972, appellants Jean Christian and Victor L. Green filed an Amended Complaint.[15] (A. 1, 4-33). In the Amended Complaint, appellants sought injunctive and declaratory relief for themselves and for others similarly situated, to secure the right to a fair hearing concerning their eligibility for unemployment compensation. (A. 4, 12-14). Appellants alleged that the denial of fair hearings in connection with their right to unemployment compensation violated 5 U.S.C. §§8501-8508, 42 U.S.C. §503(a), 42 U.S.C. §1983, 42 U.S.C. §1985, and the Fifth and Fourteenth Amendments to the United States Constitution. (A. 4, 12-14).

Subsequent to the filing of cross motions for summary judgment by the appellants and the federal appellees, (A. 1-2, 49-50, 50-55), United States District Judge Marvin E. Frankel referred this case to the Chief Judge of the United States Court of Appeals for the Second Circuit for the convening of a statutory three-judge court. (A. 2, 59). Pursuant to an Order by the Chief Judge, dated May 24, 1972, Circuit Judge Paul R. Hays and District Judge Arnold Bauman, in addition to District

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[15] Named as defendants in the Amended Complaint were the New York State Department of Labor, Division of Employment; its Industrial Commissioner, Louis L. Levine; the United States Department of Labor; its Secretary, James D. Hodgson; the United States Postal Service Corporation; its Postmaster General, Elmer T. Klassen; the United States Civil Service Commission; its Chairman, Robert E. Hampton, and its commissioners, James E. Johnson and Jayne Spain; the United States Department of the Treasury; and its Secretary, John Connally. (A. 5-7).

Judge Marvin E. Frankel, were designated to hear the case. (A. 2, 59). After the June 8, 1972 hearing before the statutory court (A. 2), a majority of that court, one judge dissenting, denied the requested relief and dismissed the action. (A. 2, 62-77). In its opinion, dated July 24, 1972, the majority held: that the state and federal appellees' denial of a fair hearing to appellants concerning their eligibility for unemployment compensation under the UCFE program did not violate 5 U.S.C. §§8501-8508; that the state appellees' denial of a fair hearing to appellants concerning their eligibility for unemployment compensation under the UCFE program had a rational basis and was not violative of due process or equal protection; and that the court had no jurisdiction over the federal appellees under either 28 U.S.C. §1361 or 28 U.S.C. §1343 to determine appellants' constitutional claims against the federal appellees. (A. 62-70). In his dissenting opinion, Judge Marvin E. Frankel stated that he would not reach the constitutional questions, but instead would grant judgment for the appellants, on the ground that 42 U.S.C. §503(a) and 5 U.S.C. §§8501-8508, properly construed, require provision of a fair hearing, as held by *Smith v. District Unemployment Compensation Board*, 435 F.2d 443 (D.C. Cir. 1970). (A. 71-77).

SUMMARY OF ARGUMENT

Pursuant to the appellees' interpretation of the UCFE program, former federal employees who did not resign are conclusively denied their earned unemployment compensation solely on the basis of their former employers' *ex parte* reasons for termination without any opportunity for a fair hearing to contest those *ex parte* reasons. Appellants, denied their compensation without any opportunity for a fair hearing at any time, are denied

the fair hearing which is required by the Constitution, which is already provided to all other workers covered by unemployment compensation, and which is required by the unemployment compensation statutes.

A. Due Process

As required by 42 U.S.C. §503(a)(3), New York provides an unemployment compensation fair hearing to all workers who are denied their statutory entitlement to unemployment compensation. N.Y. Labor Law §620. Since the UCFE program in New York is administered pursuant to state law, the appellants are provided with the form of this procedure, but pursuant to the appellees' interpretation of the UCFE program, the appellants are denied this statutory fair hearing, although they have had no previous opportunity for any fair hearing through their federal employers. The denial of this fair hearing violates the most fundamental requirement of due process: the opportunity to be heard. Moreover, it altogether denies the appellants an opportunity to contest the employers' reasons for termination, the issue most frequently disputed in unemployment compensation. This adjudicatory procedure, which denies the appellants any opportunity for a fair hearing at any time on the issue most crucial to the statutory scheme, constitutes a fundamental denial of due process of law.

B. Equal Protection

Although this right to a fair hearing is denied to former federal probationary employees who did not resign, the same right to be heard on the issue most crucial to the unemployment compensation statutory scheme is provided to all other covered workers: permanent and

probationary private employees, permanent and probationary state employees, permanent and probationary federal employees who resign, and all permanent federal employees. This classification denying the right to be heard to a single group of former employees is not created by the unemployment compensation statutes. Rather, it is created by the appellees' interpretation of those statues. Such a classification, unsupported by any basis at all related to the purposes of unemployment compensation, denies the appellants equal protection of the laws.

C. Statutory Interpretation

The unemployment compensation statutes explicitly require an opportunity for a fair hearing for all workers whose claims for compensation are denied and further require unemployed federal workers to be placed on par with all other covered workers. Consistent with those requirements, the language of 5 U.S.C. §8506(a), which directs the making of "findings" concerning the "reasons for termination of employment," means findings made after a fair hearing and not mere *ex parte* reasons asserted by a former employer. Since only the findings made after a hearing may be "final and conclusive" on the states, this interpretation allows former federal probationary employees who did not resign to fairly establish the reasons for termination either in the statutory fair hearing already provided by the state or in a federal hearing. Such an interpretation gives effect to the statutory objectives of providing an effective wage substitute for unemployed workers without resort to relief, of maximizing the workers' opportunities to find new employment, and of providing unemployment compensation to all covered federal employees on the same

terms and conditions as apply to all other covered workers. This interpretation also provides for proper construction of a remedial statute and avoids declaring the statute unconstitutional.

D. Jurisdiction

Under the line of cases firmly established by this Court, the district court had subject matter jurisdiction under 28 U.S.C. §1361 and 28 U.S.C. §1343(3) to determine whether the federal appellees have abused their discretion in an unconstitutional manner and whether the federal and state appellees' joint interpretation and enforcement of the UCFE program have deprived the appellants of their constitutional rights.

ARGUMENT

A. THE DENIAL OF A FAIR HEARING TO UNEMPLOYED WORKERS, CONCERNING THEIR DISQUALIFICATION FROM RECEIVING UNEMPLOYMENT COMPENSATION, VIOLATES THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The violation of due process presented in this case is basic: appellants, disqualified from receiving their earned unemployment compensation, are denied a fair hearing at any time in which they may contest and have fairly determined the fundamental factual issue on which their disqualifications were based.

In recent years this Court has been concerned with some of the more subtle nuances of due process present in the timing of hearings and the form of the requisite elements of such hearings. By the weighing of competing interests, this Court has resolved these finer questions in a

variety of contexts. See, *e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972) (notice and hearing required prior to prejudgment writ of replevin); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (notice and hearing required prior to termination of welfare benefits); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (notice and hearing required prior to prejudgment garnishment of wages). While these decisions requiring prior hearings *a fortiori* establish a right to at least one hearing, the appellants here are denied even this one hearing.

Rather than concerning the timing or form of a fair hearing, the issue here concerns the availability of a hearing which is required by statute and which is provided to all other persons for an impartial adjudication on a factual issue essential to the unemployment compensation statutory scheme.[16] As required by 42 U.S.C. §503(a)(3), New York provides a fair hearing to all persons who are dissatisfied with an initial determination of ineligibility for or disqualification from compensation. N.Y. Labor Law §620. Since a worker who has accrued an entitlement to compensation, N.Y. Labor Law §590 and 591, may be disqualified from receiving that compensation if the reason for his separation was due to leaving his employment without good cause or due to misconduct in connection with his employment, N.Y. Labor Law §593, the required fair hearing includes an impartial review of the reasons for separation. That the denial of this fair hearing violates due process is evident from this Court's decision in *Bell v. Burson*, 402 U.S. 535 (1971), which may be paraphrased as follows: "Since the

[16]It is this fair hearing on the "most frequently disputed" issue in unemployment compensation, *California Department of Human Resources v. Java*, 402 U.S. 121, 126 (1971), which is denied to the appellants and to other former federal probationary employees who did not resign.

statutory scheme makes . . . [the reasons for termination] an important factor in the State's determination to deprive an individual of his . . . [compensation], the State may not, consistently with due process, eliminate consideration of that factor in its . . . hearing." 402 U.S. at 541.[17]

The denial of due process here becomes even more apparent after an examination of the fundamental principles of due process. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), this Court reviewed those principles pursuant to which due process protects property interests such as earned statutory entitlements. In order "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." 408 U.S. at 570-771 (emphasis in original). Although the nature of a due process property interest may not be susceptible of precise delineation, the Court indicated that statutory entitlements such as unemployment compensation are near the core:

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[17] But for appellees' interpretation of 5 U.S.C. §8506(a), appellants would have been afforded an impartial initial determination of their eligibility for or disqualification from receiving compensation, N.Y. Labor Law §597; thereafter they would have been provided with a full evidentiary hearing before a referee, N.Y. Labor Law §620, with an opportunity for review of the referee's findings of fact and conclusions of law before the Unemployment Insurance Appeal Board, N.Y. Labor Law §621, and with an opportunity for review before the state courts on questions of law, N.Y. Labor Law §624.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . .

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." 408 U.S. at 577.

Entitlement to unemployment compensation, like welfare entitlement, is grounded in the statutory terms of eligibility.[18] But even more than public assistance, entitlement to unemployment compensation, which is accrued through employment and earnings, is generally understood as and was intended by Congress to be earned

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[18] 5 U.S.C. §8502(b) directs, "that compensation will be paid by the State to a Federal employee . . . subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State."

Under the Unemployment Insurance Law of New York, earned unemployment compensation must be paid to any worker who has earned a minimum remuneration during a minimum period of time, N.Y. Labor Law §590, who is totally unemployed and willing and able to work, N.Y. Labor Law §591, and who became unemployed involuntarily through no fault of his own, N.Y. Labor Law §593.

remuneration to which the worker is entitled as a matter of right.[19]

As the interest here is one protected by due process, the fundamental due process requisites of notice and hearing may not be denied. Beyond these fundamental requisites, however, the timing of the hearing required by due process and the form of the requisite elements appropriate to that due process hearing are ordinarily determined by weighing the respective interests of the opposing parties. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972); see also *Fuentes v. Shevin*, 407 U.S. 67, 90, n. 21 (1972). It is pursuant to

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[19] When the Social Security Act was first brought to the floor of the House in 1935, the Chairman of the House Ways and Means Committee described the nature of unemployment compensation as follows:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. *The protection afforded by social insurance comes to the worker as a matter of right.*" 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton) (emphasis added).

Unemployment compensation was also described as a "contractual right" when it was introduced in the Senate. Report of the Committee on Economic Security, Hearings on S.1130 before Senate Finance Committee, 74th Cong., 1st Sess. 1321-1322 (1935).

In 1970, when Congress was addressing itself to certain amendments to unemployment compensation, it described unemployment compensation as an "earned monetary entitlement." Report of the Senate Finance Committee on the Employment Security Amendments of 1970, S. Rep. No. 91-752, 91st Cong., 2nd Sess. 24 (1971). See also Report of the House Ways and Means Committee on the 1970 Employment Security Amendments, H.R. Rep. No. 612, 91st Cong., 1st Sess. 19 (1970).

this weighing process that the Court has determined the finer issues of timing and form. Here, however, there is no issue as to the timing of the hearing, nor is there any issue here concerning the form of presenting evidence, of confronting and cross-examining witnesses, of obtaining counsel, of having a decision based upon the evidence, or even of having an impartial decision-maker since the appropriate procedures are already part of the state-administered statutory scheme. Instead, the issue here concerns the very right to that statutory fair hearing on an issue essential to an adjudication of the statutory entitlement.

The basic requisites of due process have been well established by this Court. The "fundamental requirement of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). And all persons "whose rights are to be affected are entitled to be heard." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863). The hearing provided to these persons must be "meaningful." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). It must be a "fair hearing on the fundamental facts." *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 199 (1933). Once due process attaches, these fundamental requisites are not to be denied.

Despite these fundamental requirements, a majority of the court below denied the appellants any opportunity for a fair hearing at any time. Relying upon an apparent misreading of *Goldberg v. Kelly*, 397 U.S. 254 (1970), the majority reasoned that "factual distinctions between *Goldberg* and the case at bar highlight the conclusion that the Government's interest in summary adjudication outweighs plaintiffs' need for a hearing here." (A. 69). Although the majority recognized that "[c]compensation is available as a matter of right," it reasoned that such compensation is "not of the same urgent nature to the

survival of the claimant as are welfare benefits," and that the appellants therefore must be altogether denied any opportunity to be heard on the adjudication of that right. (A. 69).

That *Goldberg* at the very least requires a fair hearing here is apparent from only a brief examination of that decision. In *Goldberg*, of course, it was admitted that due process required an opportunity to be heard at some point in the adjudicative procedure,[20] and in fact a full evidentiary review, similar to the hearing sought in the instant case, was required and already available as part of the administrative scheme. 397 U.S. at 257-258, 260, n. 7. The issue in *Goldberg*, unlike the more fundamental issue here, was whether due process further required a welfare recipient to be afforded some form of an "evidentiary hearing *before* the termination of benefits," 397 U.S. at 260 (emphasis in original). In deciding that issue, this Court weighed the opposing interests, not to determine whether *any* hearing was required, but to determine whether a *prior* hearing was required where there already was a subsequent fair hearing, and, deciding that affirmatively, to determine the form of that prior hearing in view of the subsequent evidentiary hearing. 397 U.S. at 260-271.

The issue here of course does not concern the timing or form of the fair hearing already provided by statute,

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[20] In *Goldberg*, this Court stated:

"Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.... Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 (1963)." 397 U.S. at 261-262 (footnote omitted).

but rather it concerns only the availability of that statutory hearing. Borrowing the weighing test used in *Goldberg* to determine the timing and form of the hearing required by due process in that context, the majority below erroneously sought to employ this test to determine whether *any* hearing was required. By using an analysis similar to that squarely rejected by this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-571 (1972), the majority incongruously denied the very meaning of due process to persons whose property interests are protected by due process. Once due process attaches, however, its "root requirement that an individual be given an opportunity for a hearing" cannot be so denied. *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971).[21]

Although the fair hearing sought by appellants is already part of the statutory scheme here and was conceded to be required in *Goldberg*, and although the weighing process cannot emasculate the basic meaning of due process, the majority's weighing process, inappropriate as it was, entirely missed the mark even in its application. Reasoning that the need of unemployed workers' for their earned unemployment compensation was less critical than was the welfare recipients' need for welfare benefits in *Goldberg*, the majority held that the worker's interest in *any* hearing was outweighed by the

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[21] In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court stated:

> "The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process . . . But *some* form of notice and hearing–formal or informal–is required before deprivation of a property interest that 'cannot be characterized as *de minimus*.' *Sniadach v. Family Finance Corp.*, 395 U.S. at 342 (Harlan, J., concurring)." 407 U.S. at 90, n. 21.

See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

government interest in summary adjudication. (A. 69). First, of course, this Court has disposed of the notion that the welfare recipients' *need* for welfare benefits was critical to the timing or form of the hearing required in *Goldberg*. See *Fuentes v. Shevin*, 407 U.S. 67, 88-89 (1972).[22] Moreover, the purported government interest of summary adjudication which the majority below assumed to be identical to that in *Goldberg*, does not in fact exist here. In *Goldberg*, the government had argued that "[s]ummary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible," and that this interest "justif[ied] the delay of any evidentary hearing until after discontinuance of the grants." 397 U.S. at 265. This proffered interest, rejected as constitutionally insufficient in *Goldberg*, 397 U.S. at 266, is not even present here since the government does not seek to justify a delay of the evidentiary hearing but to justify a complete denial of an evidentiary hearing on a fundamental issue.[23] Similarly, any proffered interest in speed

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[22] In *Fuentes* this Court stated that a view similar to that adopted by the majority below "reflects the premise that those cases [*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Goldberg v. Kelly*, 397 U.S. 254 (1970)] marked a radicial departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. . . . While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine." 407 U.S. at 88-89 (footnotes omitted).

[23] In *Torres v. New York State Department of Labor*, 321 F.Supp. 432 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968 (1971), *previous decision adhered to*, 333 F.Supp. 341 (S.D.N.Y.

and efficiency, probably the most frequently rejected government interest,[24] can find no factual support here since the administrative machinery intended for the very purpose of fact-finding and review is already required by statute, and provided to all unemployed workers–except to workers such as appellants.

The majority's misapplication of due process principles and its resultant denial of any due process hearing to the appellants allows the appellants' former employers to engage in that type of adjudication which this Court has carefully sought to guard against: a "secret, one-sided determination of facts decisive of rights," *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion of Frankfurter J.). That such an adjudicative procedure was used to deny the

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1971), *aff'd without opinion*, 405 U.S. 949 (1972), a second case relied upon by the majority below, the governmental interest in summary adjudication was identical to that interest present in *Goldberg*. Since *Torres*, like *Goldberg*, concerned prior hearings, that government interest simply is not present here. Moreover, the fair hearing sought by the appellants here is already provided by the unemployment compensation statute which was at issue in *Torres*. N.Y. Labor Law §620.

[24] In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court rejected such a proffered interest stating:

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." 405 U.S. at 656 (footnote omitted).

See also *Bell v. Burson*, 402 U.S. 535, 540-541 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

appellants their earned unemployment compensation is well illustrated by the facts surrounding the denial of compensation to appellant Christian. Initially disqualified from receiving compensation, solely on the basis of her former exployer's *ex parte* reasons for separation which were treated as "final, conclusive and binding" by the state, appellant Christian appealed that secret, one-sided determination to a state hearing referee. (A. 15-16, 19, 44). After an evidentiary hearing, the hearing referee apparently mistook his function by making an independent finding on the evidence—which finding contradicted the *ex parte* reasons submitted by the employer—and held Ms. Christian eligible for her compensation. (A. 21-22, 45). The referee's failure to accord final and conclusive weight to the reasons asserted by the employer was appealed by the state, however, and reversed by the Appeal Board which held that it was "bound" by the employer's *ex parte* reasons. (A. 23-24, 27-28, 45).

Since this unemployment compensation statutory scheme already provides for the form of a fair hearing, the substance of which is denied to appellants, this case is most readily comparable to that considered by the Court in *Bell v. Burson*, 402 U.S. 535 (1971). In *Bell* this Court determined the scope of the hearing necessary to suspend temporarily an uninsured motorist's driver's license. Although the statutory hearing allowed consideration of whether the driver had been involved in an automobile accident, had been insured and had posted bond, it specifically excluded from consideration the crucial question of possible liability. On reasoning equally applicable to the instant case, this Court held that due process was violated by the failure to afford a hearing on the issue of liability—the issue crucial to the statutory scheme:

"Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.

"The hearing required by the Due Process Clause must be 'meaningful,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and 'appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co., supra*, at 313. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard." 402 U.S. at 541-542.

No less than the exclusion of the issue of liability in *Bell*, the preclusion of the termination issue in an unemployment compensation hearing deprives the worker of all opportunity to be heard on an element essential to the decision. It should need no greater explication than in *Bell* that a hearing which excludes consideration of an element essential to an adjudication disqualifying a worker from his unemployment compensation does not meet the standards of due process.

B. THE DENIAL OF A FAIR HEARING TO FORMER FEDERAL PROBATIONARY EMPLOYEES WHO DID NOT RESIGN, CONCERNING THE REASONS FOR TERMINATION OF EMPLOYMENT, WHEN SUCH HEARINGS ARE PROVIDED TO ALL OTHER EMPLOYEES COVERED BY UNEMPLOYMENT COMPENSATION, VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The statutory provisions for unemployment compensation in the Social Security Act of 1935, 42 U.S.C. §§501-503, and in the Social Security Act as amended by the Unemployment Compensation for Federal Employees program, 5 U.S.C. §§8501-8508, do not classify any covered workers so as to deny the right to a fair hearing. The appellees, however, have interpreted 42 U.S.C. §503(a)(3) and 5 U.S.C. §§8501-8508 in a manner which provides an opportunity for a fair hearing on the reasons for termination of employment to all workers covered by unemployment compensation except to former federal probationary employees who did not resign.[25] This classification, unsupported by any basis reasonably related to the purposes of unemployment compensation, denies the appellants equal protection of the laws.

The manner in which this classification has been created reflects its lack of rationality. First, pursuant to

[25] In many respects, the manner in which the classification has been created here is similar to the manner in which the classification had been created in *Frontiero v. Richardson*, ___ U.S. ___ , 41 U.S.L.W. 4609 (May 14, 1973). There, as here, the classification was not created by the federal statutory provisions at issue, but rather it was created by a federal agency's interpretation and enforcement of those statutory provisions.

the explicit requirements of 42 U.S.C. §503(a) as enforced by the Secretary of the United States Department of Labor, the State Department of Labor provides an opportunity for a fair hearing to all workers covered by unemployment compensation in New York. N.Y. Labor Law §620. Since coverage in New York extends not only to workers in private employment[26] but also to workers in state employment,[27] whether permanent or probationary,[28] all of these workers are provided with an

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[26] See N.Y. Labor Law §§512 & 560.

[27] Pursuant to N.Y. Labor Law §§512, 560 & 590.5, all state employees, except unclassified employees, are covered by and eligible for unemployment compensation. Since unclassified employees in New York are only those state employees who hold political or elective offices, N.Y. Civil Service Law §35, with all other state employees, whatever their status, being categorized as classified employees, N.Y. Civil Service Law §40, the overwhelming majority of state employees are covered by and eligible for unemployment compensation. For purposes of illustration, in the year 1965, 133,800 of the 143,500 state employees were covered by unemployment compensation, with only 9,700 political or elective employees not covered. New York State Department of Labor, *Unemployment Insurance Coverage of Workers in New York State*, 17-18 (August, 1967).

[28] Like the UCFE statute, the Unemployment Insurance Law of New York draws no distinction between permanent or probationary employees. This is not to say, however, that the Civil Service Law of New York does not draw distinctions between and among various classes of state workers. Indeed, state classified employees (those who are covered by unemployment compensation) are initially divided into four subclasses, see N.Y. Civil Service Law §§40-44, several of which are subdivided even further into probationary employees, temporary employees, and provisional employees, see N.Y. Civil Service Law §§63-65. All of these classified employees, however, are covered by unemployment compensation, and all are eligible for fair hearings for purposes of unemployment compensation at which they may fairly establish the reasons for their separation from employment, N.Y. Labor Law §620.

opportunity for a fair hearing on the reasons for termination of employment.

Second, pursuant to these same statutory requirements, and pursuant to 5 U.S.C. §8506(a) as interpreted by the Secretary of the United States Department of Labor, the State Department of Labor also provides an opportunity for a fair hearing for purposes of unemployment compensation on the reasons for termination to all federal employees, whether permanent or probationary, who resign, 20 C.F.R. §609.18(a).[29] Although this regulatory provision appears to be no more than an unsuccessful attempt to conform agency practice to federal court decisions,[30] its effect plainly is to allow an

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[29] 20 C.F.R. §609.18(a) provides:

> "Federal findings under §609.6 or §609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under §609.23."

[30] The regulation, promulgated in 36 Fed. Reg. 13330 (July 20, 1971), amended an earlier version which had stated only: "Federal findings under §609.6 or 609.7 shall be final and conclusive." 20 C.F.R. §609.18(a), 32 Fed. Reg. 20969 (Dec. 29, 1967). Since the regulation was amended to its present form after both the unanimous decision of the United States Court of Appeals for the District of Columbia, and the amended order, on remand, of the United States District Court for the District of Columbia in *Smith v. District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), *on remand*, Civil No. 2232-68 (D.D.C. Feb. 1, 1971) (see Brief App. 1c-2c), it is apparent that the amended regulation was promulgated in an attempt to conform with these

opportunity to be heard to those federal workers who resigned.

Third, pursuant to regulations of the Civil Service Commission, all permanent federal employees, as a result of their permanent status,[31] are accorded termination hearings by their employing agency[32] or by the Civil Service Commission on appeal.[33] Since these termination hearings most basically are hearings concerning the reasons for separation, permanent federal employees also are entitled to an opportunity to be heard.

Finally, however, pursuant to 42 U.S.C. §503(a) and 5 U.S.C. §8506(a), again as interpreted by the Secretary of the United States Department of Labor, the State Department of Labor denies an opportunity for a fair hearing on the reasons for termination to former probationary employees who did not resign. 20 C.F.R. §609.18(a). This classification is not only unrelated to the objectives of unemployment compensation, but it is altogether contrary to those objectives.

In *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), this Court noted that the "purpose of the [Social Security] Act was to

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decisions. That the amended regulation hardly conforms with those decisions is apparent from the Court of Appeals' holding in *Smith* that: "*no finding* by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing." 435 F.2d at 438 (emphasis added).

[31] The first year of federal employment is a probationary period, 5 C.F.R. §§315.801(a) and 315.802(a). Thereafter the employee is considered a permanent employee.

[32] See generally, 5 C.F.R. §§752.201 *et seq.* and 5 C.F.R. §§771.101 *et seq.*

[33] See generally, 5 C.F.R. §§752.201 *et seq.* and 5 C.F.R. §§772.301 *et seq.*

give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over until they get back to their old work or find other employment without having to resort to relief.' " 402 U.S. at 131 (footnote omitted). More importantly, the Act itself explicitly requires the states to adopt administrative procedures which are "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. §503(a)(1), and to provide "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied," 42 U.S.C. §503(a)(3).

When Congress amended the Social Security Act by adding the UCFE program, it reemphasized these objectives by requiring determinations of eligibility to be "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law," 5 U.S.C. §8502(d), and by requiring compensation to be paid "on the same terms and subject to the same conditions as . . . under the unemployment compensation law of the State," 5 U.S.C. §§8502(b) and 8503(a). These explicit requirements reflect the specific congressional purpose in enacting the UCFE program: "The Federal government should not be in the position of providing less favorable conditions of employment than are required of private employers."[34] Despite the clarity of these statutory directives and objectives, the appellees have concluded that the federal government should *not* be in the position of providing these same

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[34] S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 7 (1954); see also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

terms and conditions of employment to former probationary employees who do not resign. Their creation of this classification is contrary to the basic principles of equal protection established by this Court.

The fundamental principle of equal protection was stated recently by The Chief Justice, writing for the Court in *Reed v. Reed*, 404 U.S. 71 (1971): "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co., v. Virginia*, 253 U.S. 412, 415 (1920)." 404 U.S. at 76. See also *Morey v. Doud*, 354 U.S. 457, 465 (1957).

Applying this fundamental standard in *Reed v. Reed, supra*, this Court noted that the proferred rational basis of reducing the work load on probate courts was a legitimate legislative objective, but the Court held that the creation of a statutory preference for members of one sex over the members of the other sex for appointment as an administrator was not rationally related to that objective. More recently, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court did not question the importance of protecting legitimate family relationships, the proferred rational basis there, but it found that the exclusion of illegitimate children from workmen's compensation recovery was not reasonably related to the objectives of workmen's compensation. Similarly, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court noted that although a general prohibition on contraceptives may be a legitimate legislative objective, denial of the contraceptives to unmarried persons but not to married persons was not reasonably related to the objective of the legislation. See also *Townsend v. Swank*, 404 U.S. 282, 291 (1971), where this Court noted that

assisting needy children to become employable and assuring fiscal integrity of a state's welfare program were worthy objectives, but where the Court doubted that a state's denial of AFDC eligibility to those children who attended college was at all reasonably related to those objectives. Thus, in assessing whether a classification constitutes a denial of equal protection, the express purposes of the legislation must be closely examined to determine whether the classifications created are rationally related to those objectives.[35]

In the three-judge court below the appellees did not attempt to relate their classification to the objectives of unemployment compensation. Rather, the only interest put forth at all was that asserted by the federal appellees of having an unfettered right to fire their probationary employees.[36] Although this interest may be a legitimate

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[35] It is well established that these principles restrict the arbitrary actions of federal officials under the Due Process Clause of the Fifth Amendment as much as they restrict those of state officials under the Equal Protection Clause of the Fourteenth Amendment. See, *e.g.*, *Frontiero v. Richardson*, ___ U.S. ___, 41 U.S.L.W. 4609 (May 14, 1973); *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Additionally, this Court has stated: "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 608, 641 (1969); see also *Townsend v. Swank*, 404 U.S. 282, 291 (1971).

[36] In the Court below, the state appellees, who provide fair hearings to permanent and probationary private employees, to permanent and probationary state employees, and to permanent and probationary federal employees who resign, and who are required by 42 U.S.C. §503(a)(3) to provide fair hearings to "all individuals whose claims for unemployment compensation are denied," offered no justification whatsoever for their denial of fair hearings to former Federal probationary employees who did not resign.

concern of the federal appellees in the employment and dismissal of their personnel, it is unrelated to the stated objectives of unemployment compensation. The majority of the court below, however, erroneously accepted this interest as a sufficient rational basis to sustain the classification. The majority stated that "Congress had good reason to differentiate between probationary and permanent employees in trying to promote the efficient disposition of Federal business." (A. 68). This "good reason" inferred by the majority was stated earlier in its opinion: "Certainly the Congress intended that Federal employers should have an unfettered right to terminate probationary employees up to the time such employees acquire permanent status. No termination hearing is prescribed or required nor should it be .... Such a hearing, as a practical matter, would limit the Government in the discharge of probationary employees to an extent never previously contemplated by the Congress." (A. 66-67).

The insufficiency of the federal appellees' alleged interest, as erroneously adopted in the majority's decision, is demonstrated by four considerations. First, of course, Congress made no distinction whatsoever between permanent and probationary federal employees for the purposes of the UCFE program. As stated by Judge Frankel in his dissenting opinion: "When Congress wrote the provisions before us for 'federal employees,' it drew no distinction between permanent and probationary workers. Neither the statute nor its history suggests that anyone had such a distinction, or its possible consequences, in mind."[37] (A. 73-74). In fact, the only

[37] Judge Frankel also made the compelling observation that Congress may even have been completely unaware of the civil service distinctions between probationary and permanent employees since the UCFE legislation had not been the responsibility

suggestion in either the statute or the legislative history which relates to this question compels a contrary conclusion. The definition section of the UCFE statute, rather than distinguishing between types of federal employees, plainly states: "'Federal employee' means an individual who has performed Federal service." 5 U.S.C. §8501(3).

Second, and again contrary to both the federal appellees' and the majority's position, neither Congress' objectives in providing unemployment compensation nor the appellants herein seek to limit the government in its discharge of probationary employees. As stated by Judge Frankel:

> "It should be stressed, therefore, that nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation. When the majority speaks of what is foreseen 'as a practical matter,' it evidently reflects the concern, exhibited in arguments to us for defendants, that the prospect of a hearing—even though not testing the discharge or capable of doing so—would make supervisors in the employing agencies timorous about discharging probationary people. This is a regrettable position. Insofar as it is accurate, it portrays a regrettable situation. We ought not to be so 'practical' that we fashion legal judgments upon the premise that federal officials commonly fire people upon grounds so tenuous that they would not dare order the firings if they thought someone, somewhere else, without author-

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of the House and Senate committees concerned with civil service affairs, but instead, "the responsible committee handling UCFE were House Ways and Means and Senate Finance." (A. 74).

ity to reverse the firings, might so much as air the asserted grounds." (A. 76) (emphasis in original).

Third, the purported rationale offered by the federal appellees and adopted by the majority below was neither attempted to be related to the objectives of unemployment compensation, nor is it in fact related to those objectives. Since one of those objectives was the provision of unemployment compensation to federal employees on the same conditions as apply to other covered employees, and since 42 U.S.C. §503(a)(3) plainly requires a fair hearing for all covered workers, denial of a fair hearing to one limited group of unemployed workers seriously conflicts with that explicit congressional objective, especially since the employment of probationary employees is conceded to be more precarious than that of permanent employees.[38] The objectives sought by Congress cannot be undone by the federal appellees, nor can they be subverted in their scramble to find a reasonable basis "having a fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Finally, the proferred rationale of an employment distinction between permanent employees and probationary employees does not even reflect and hence cannot support the actual classification applied by the

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[38]This consideration was aptly spelled out in the dissenting opinion of Judge Frankel:

"The strikingly inferior position to which plaintiffs have thus far been relegated for unemployment compensation purposes was never decreed—and seems never to have been considered as a prospect—by the Congress. The explicit purpose of putting public and private employees on a par applies at least as much to probationary workers (whose employment is more precarious) as to permanent workers for purposes of insurance against unemployment." (A. 75-76).

appellees. As discussed at pp. 30-33, *supra*, an opportunity to be heard on the reasons for separation is already provided not only to private and state probationary employees, but also to federal probationary employees who resign. Thus, the appellees' classification of former federal probationary employees who do not resign, to which the appellees and the majority deny the right to be heard, does not correspond to their more broadly based rationale. Not only are they without any basis reasonably related to the purposes of unemployment compensation, but they are without any basis at all.

The denial of the due process right to a hearing to one limited group while granting that right to a hearing to all other persons "is inescapably contrary to the Equal Protection Clause." *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (footnote omitted). In a recent case identical in all material respects to the instant case, *Smith v. District Unemployment Compensation Board*, 435 f.2d 433 (D.C. Cir. 1970), a unaminous panel of the Court of Appeals for the District of Columbia, after examining both the invidious classification and the objectives of the legislation, declared:

> "There is *no reasonable basis* for supposing that whereas Congress deliberately insisted on opportunity of hearing for employees generally, it deliberately established a no-hearing enclave for a relatively small group of Federal employees, and permitted them to be conclusively bound by a Federal finding made in the absence of a hearing." 435 F.2d at 438 (emphasis added).

As there is no reasonable basis for the establishment of a no-hearing enclave for such a limited group of federal employees, the appellees' classification must fall as a denial of equal protection of the laws.

C. THE DENIAL OF A FAIR HEARING TO UNEMPLOYED WORKERS, CONCERNING THEIR DISQUALIFICATION FROM RECEIVING UNEMPLOYMENT COMPENSATION, VIOLATES THE PROPER STATUTORY CONSTRUCTION OF 42 U.S.C. §503(a)(1) & (3) AND 5 U.S.C. §§8501-8508.

In reviewing acts of Congress which have been applied in a manner so as to raise substantial constitutional doubt, the Court has repeatedly held that "such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903); see also, *Schneider v. Smith*, 390 U.S. 17, 26 (1968) citing a "stream of authority." The Court has also held that the interpretation of such acts ought not to frustrate the basic purposes of the statute, *California Department of Human Resources Development v. Java*, 402 U.S. 121, 134 (1971), and more importantly, that the statutory "terms . . . are to be construed to accomplish the purposes of the legislation," *United States v. Silk*, 331 U.S. 704, 712 (1947). In the instant case, the appellees urge the Court to construe the statute at issue in a manner which serves to frustrate its purposes and in a manner which, if accepted, would require holding that statute to be unconstitutional.

The statute at issue, 5 U.S.C. §8506(a), provides that a former federal employer shall make available to a state unemployment compensation agency or to the Secretary of Labor various information concerning the services and wages of former employees. Specifically at issue here is the language of 5 U.S.C. §8506(a) which provides:

> "The information shall include the findings of the employing agency concerning–
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> * * * * *

"(4) the reasons for termination of Federal service.

* * * * *

"Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c)."

The appellants, Judge Frankel in his dissent from the majority of the three-judge court below (A. 71-77), and a unaminous panel of the Court of Appeals for the District of Columbia in *Smith v. District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), interpret this language, consistent with the purposes of the statute, to mean that *ex parte* reasons, which are mere assertions made without a hearing, are not *findings* and hence are not and cannot be final and conclusive in the fair and impartial hearing procedure already provided by the state. The appellees and a majority of the court below, however, interpret this same language to mean that the *ex parte* reasons asserted by the former federal employers as the cause for separation from employment are *findings*, and that those *ex parte* reasons, no matter how they were obtained, are final and unreviewable in the fair hearings required to be provided by the states. This twisted and unconstitutional interpretation is contrary to the purposes of the Social Security Act, as amended by the UCFE program, is contrary to the statutory language implementing those purposes, and is contrary to basic principles of statutory construction.

When Congress encouraged the adoption of unemployment compensation programs through its passage of the Social Security Act of 1935, as amended, 42 U.S.C. §§501-503, 1101 *et seq.*, and the Federal Unemployment Tax Act, as amended, 26 U.S.C. §§3301-3309, it sought to achieve two basic objectives: to provide sustenance and temporary security to unemployed work-

ers without their being relegated to seeking charity or public assistance; and to maximize the opportunity for unemployed workers to concentrate their time and efforts on finding new employment. Thoroughly familiar with the plight of workers who are "thrown out of work suddenly,"[39] and in recognition of their need for financial "security during the period following unemployment,"[40] Congress created a type of security specifically designed to "carry workers over most, if not all, periods of unemployment in normal times, without resort to any other form of assistance."[41] In designing unemployment compensation as a means to enable "workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment without having to resort to relief,"[42] Congress was particularly mindful of the need to avoid the stigma and loss of self-respect which characteristically accompanies resort to public relief:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the

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[39] Statement of Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935).

[40] S. Rep. No. 628, 74th Cong., 1st Sess., 12 (1935).

[41] Report to the President, Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1321-1322 (1935).

[42] H.R. Rep. No. 615, 74th Cong., 1st Sess., 7 (1935).

worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief.[43]

A second objective sought to be achieved through the availability of unemployment compensation was that of maximizing the opportunity to look for work. Recognizing that "unemployment compensation should be set up under conditions which tend towards the regularization of employment,"[44] Congress emphasized that those suddenly thrown out of work must "be permitted to look for a job. They should not be doing anything else but looking for a job."[45]

In order to ensure that these objectives would be carried out by the states, which generally were given a degree of flexibility in the creation of their state unemployment compensation programs,[46] Congress directed the states to adopt certain minimal administrative procedures. Among these directives was the general requirement that the states adopt only such procedures as are "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503(a)(1). In order to ensure a fair determination for the payment of such compensation, Congress further required the states to provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individ-

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[43] 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton).

[44] S. Rep. No. 628, 74th Cong., 1st Sess., 14 (1935).

[45] Statement of Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935).

[47] Message of the President, H.R. Doc. No. 81, 74th Cong., 1st Sess., 16 (1935).

uals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(3).

When the Social Security Act of 1935 was enacted, it did not provide for coverage of federal employees.[47] Nineteen years later, however, in the wake of massive post-Korean War layoffs of temporarily employed federal workers,[48] Congress amended the Act by adding Unem-

[47] Three years after the passage of the Social Security Act of 1935, Congress extended its unemployment compensation coverage of private workers by covering unemployed railroad workers under the Railroad Unemployment Insurance Act of 1938, as amended, 45 U.S.C. §§351-367. Similar to the manner in which Congress had authorized the states to administer their own compensation programs, Congress authorized the Railroad Retirement Board to administer the railroad unemployment program. 45 U.S.C. §355(b). Again Congress sought to ensure the proper administration of the program by requiring the adoption of certain minimal administrative standards. Among these standards, once again, was the requirement that each "employee whose claim for benefits has been denied . . . shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body." 45 U.S.C. §355(c).

[48] Representative Reed, one of the sponsors of H.R. 9709, made the following remarks concerning the need for unemployment compensation coverage of federal employees:

> "Federal civilian employees as a group are subject to the risk of unemployment on nearly the same scale as non-governmental workers in the same type of work. In recent years, particularly, several extensive reductions in Federal personnel have demonstrated the real need for extending unemployment benefits to Federal employees. From a wartime peak of well over 3-1/2 million employees in June 1945, Federal employment dropped by a million between 1945 and 1946 and dropped considerably more in the next few years, leveling off at about 2 million in June 1950. After a new increase due to the Korean conflict, Federal employment again fell off by nearly 247,000 between June 1952 and December 31, 1953." 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); see also, 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

ployment Compensation for Federal Employees, 5 U.S.C. §§8501-8508, formerly Title XV of the Social Security Act, §§1501-1510, 68 Stat. 1130 (1954).[49] The broad purposes of the legislation were to end "the discrimination that has been practiced by the Federal Government against its Federal civilian employees"[50] and to "assure all of our citizens that they will be equally covered should they be so unfortunate as to become unemployed."[51] Pursuant to these objectives, Congress provided unemployment compensation coverage to nearly the entire federal civilian work force, then numbering approximately 2½ million workers.[52] Specifically included in this coverage were short-term federal employees such as probationary employees who had worked for periods as short as only two months.[53] In fact, the high

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[49] The 1954 Social Security amendments extending unemployment compensation coverage to federal employees were part of a broad legislative package the purposes of which were to extend and improve unemployment compensation generally. In addition to extending coverage to the nearly 2-1/2 million federal employees, the legislation: extended coverage to an additional 1-1/2 million private employees; allowed states to reduce unemployment tax rates for newly covered employers; and eliminated the quarterly installment means of paying the unemployment tax. See generally, H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 1-2, 9-13 (1954); S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6-7, 8-12 (1954).

[50] 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

[51] *Id.*

[52] 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10084-10085 (remarks of Representatives Rees and Reed). See also, *Economic Report of the President*, 96-97 (1954).

[53] During the House debate on H.R. 9709, the following colloquy occurred:

separation rate among these short-term employees contributed to Congress' concern for the elementary fairness of covering federal workers:

> "Total annual separations of Federal employees are substantial. They have approximated around one-half million each year over a period of several years. The percentage which constitutes reductions in force and termination of temporary assignments has varied from approximately 17 to 50 percent of total separations. I do believe that the Federal Government should not be in the position of providing less favorable conditions of employment than are required of private employers."[54]

Manifesting this concern for elementary fairness and reemphasizing the objectives of its earlier compensation programs,[55] Congress again sought to ensure the proper

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Mr. REES of Kansas. "What are we going to do with Federal employees who work for short periods of time? Suppose someone is employed in my office or anywhere else in the Federal Government and works for 2 or 3 or 4 up to 6 months. Does he come under this law and does he get any benefits under it?"

Mr. REED of New York. "If he is out of employment." 100 Cong. Rec. 10084 (1954) (remarks of Representative Rees and Representative Reed).

[54] 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer); see also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong. 2nd Sess., 7 (1954).

[55] Although the objectives sought by Congress in the Social Security Act were implicit in its extension of unemployment compensation coverage to federal employees, one of those basic objectives—the avoidance of public assistance or charity—was specifically reemphasized on the floor of the house:

> "It is my conviction that in the year and a half the Republicans have been in power we have accomplished a

and fair administration of an unemployment compensation program. Thus, although Congress authorized two alternative procedures for the payment of compensation to federal employees, one through the state programs and the other through the Secretary of Labor, 5 U.S.C. §§8502 & 8503, respectively, the same minimal standards were required under both. As to the state procedure, which was already subject to the "when due" and "fair hearing" requirements of 42 U.S.C. §503(a)(1) & (3), Congress required determinations of eligibility to be "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law." 5 U.S.C. §8502(d). As to the procedure administrated by the Secretary of Labor, which was not directly subject to the requirements of 42 U.S.C. §503(a)(1) & (3), Congress required a "fair hearing" for any federal employee whose claim for compensation was denied. 5 U.S.C. §8503(c). As to both procedures, and leaving no doubt as to the overall applicability of its requirements under 42 U.S.C. §503(a)(1) & (3), Congress required compensation to be paid to federal employees "on the same terms, and subject to the same conditions as . . . under the unemployment compensation law of the State." 5 U.S.C. §§8502(b) & 8503(a).

The specificity and yet the comprehensiveness of these congressional objectives and statutory requirements contrast vividly with the argument adopted by the majority of the court below—that somewhere in the

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great deal in abolishing thousands of Federal jobs, at a savings of billions to our tax-payers. But we have an obligation to wield our economy ax with prudence and foresight, and not to make displaced civil servants wards of the State or pawns of charitable institutions."
100 Cong. Rec. 10079 (remarks of Representative Stringfellow).

unemployment compensation scheme there is a distinction between probationary employees and permanent employees which allows federal employers to deny unemployment compensation to their former probationary employees merely by submitting *ex parte* reasons for termination of employment. (A. 66-67). Not only is this purported distinction unsupported by the statute or its legislative history,[56] but it is not even adhered to by the appellees themselves.[57]

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[56] Neither the majority of the three-judge court below nor the appellees offered any statutory language or legislative history which would even suggest an unemployment compensation distinction between probationary employees and permanent employees. In fact, there is no such language or legislative history. As Judge Frankel aptly pointed out in his dissenting opinion: "Neither the statute nor its history suggests that anyone had such a distinction, or its possible consequences, in mind." (A. 74). Indeed, the only legislative history relating to this matter plainly states that short-term employees are to be covered by unemployment compensation just as are all other employees. 100 Cong. Rec. 10084 (1954) (remarks of Representative Rees and Representative Reed).

In support of its result, the majority below disregarded this legislative history and instead relied upon the employment and dismissal distinction between probationary employees and permanent employees. (A. 66). Thus, in effect, the majority judicially grafted this employment and dismissal distinction onto the right to unemployment compensation despite the fact that the distinction is unrelated to unemployment compensation, other than its indication that short-term employees have a greater need for their earned unemployment compensation, and despite the fact that the UCFE statute itself defines a federal employee as "an individual who has performed Federal service," 5 U.S.C. §8501(3).

[57] Ironically, the distinction relied on by the majority is not even applied by the appellees. As noted at pp. 30-33, *supra*, not only are private and state probationary employees entitled to unemployment compensation on the same terms and conditions (which terms and conditions include a fair hearing) as other employees, but certain federal probationary employees too are

More basically, the majority's distinction is contrary to the congressional objectives of providing to all covered federal employees the same favorable conditions of employment as are provided to other covered employees, of providing an effective wage substitute for all covered workers, and of maximizing the workers' opportunities to seek new employment.[58]

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entitled to unemployment compensation on the same terms and conditions (which terms and conditions again include provision for a fair hearing) as other employees. Thus, the proferred distinction, in addition to being unsupported by the statute and its legislative history, is also unsupported by the appellees' own interpretation and application of the UCFE statute.

[58] Although the appellees' interpretation of 5 U.S.C. §8506(a) frustrates the explicit objectives and statutory requirements of the UCFE program in numerous and obvious ways, it frustrates these objectives and requirements in more subtle ways as well. An example is provided by the unemployment compensation requirements for wage combining whereby an employee who may not have worked long enough for or earned enough from any one employer during a one-year base period to qualify for unemployment compensation, may qualify by combining the periods of employment and wages earned under all of his employers during his preceding one-year base period. Since these wage combining requirements apply to all covered employment in New York, see New York State Department of Labor, Unemployment Insurance Bureau, Field Operations Manual §§12000-12090, and to all covered federal employment, *id.* §§21020-21032, an employee may earn compensation based upon combined private, state and federal employment. Although it may appear obvious that such an employee, who worked at his last job for only two months, should be equally eligible for compensation whether his last job was with the federal government or with another employer, the appellees' interpretation of 5 U.S.C. §8506(a) denies this equal treatment. If, for example, the worker's last job was with the state government, both he and his employer are entitled to have the reasons concerning separation fairly determined pursuant to the state fair hearing procedure. N.Y. Labor Law §620. If instead, that same

The importance of such explicit objectives and statutory requirements was recognized in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971) where the Court construed the meaning of the word "due" in §303(a)(1) of the Social Security Act, as amended, 42 U.S.C. §503(a)(1). There, the Court stated:

> "We conclude that the word 'due' in §303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment." 402 U.S. at 133.

Not only did the Court state that any otner construction would fail to meet the objective of early substitute compensation during unemployment, but the Court also emphasized that the contrary construction urged by the state would frustrate one of the basic purposes of unemployment compensation:

> "It would frustrate one of the Act's basic purposes—providing a 'substitute' for wages—to permit an employer to ignore the initial interview or fail to assert and document a claimed defense, and then effectuate cessation of payments by asserting a

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worker's last job was with the federal government, his federal employer (pursuant to the federal appellees' interpretation of 5 U.S.C. §8506) may deny compensation (based partially on the employment and earnings in non-federal employment) merely by submitting to the state *ex parte* reasons for separation. Such an equal and unfair procedure hardly serves Congress' objective of providing the same favorable terms of employment to federal employees as are provided to all other covered employees.

defense to the claim by way of appeal." 402 U.S. at 134.

Since the result of the majority's decision below allows an employer to effectuate a denial of payments while ignoring both the initial interview and the state fair hearing, it frustrates one of the Act's basic purposes—providing a substitute for wages. And since the majority's decision more basically effectuates a denial of the fundamental opportunity to be heard, it compels a violation of the very meaning of the word "due" which requires "a hearing [at] which both parties have notice and are permitted to present their respective positions." 402 U.S. at 133.

Even without considering this proper construction of the word "due", the congressional objectives as well as the explicit statutory mandates requiring a fair hearing compel an interpretation of 5 U.S.C. §8506(a) which allows an opportunity for a fair hearing. After reviewing only these latter objectives and statutory requirements, a unanimous panel of the Court of Appeals for the District of Columbia held that "the statutory scheme established by Congress plainly contemplates that a Federal employee whose claim for compensation is denied is entitled to a fair hearing," and "that no finding by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing before an impartial tribunal." *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 436, 438 (D.C. Cir. 1970). A similar conclusion was reached by Judge Frankel in his dissenting opinion below. Summarizing his major disagreement with the majority's exclusion of "a small group of federal employees from the basic right to be heard," Judge Frankel stated:

> "(1) Congress evidenced its express purpose to make that right available to all employees, private or

public, (2) Congress likewise evinced the aim of avoiding second-class citizenship for federal employees with respect to the elemental need for a dignified form of wage substitute in times of unemployment, (3) the great bulk of federal employees are in fact upon a substantial par with private workers in having an opportunity to contest factual determinations which, if adverse, may preclude unemployment compensation, (4) the deprived group, probationary employees, appears not to have been specially noticed during the legislative process, and certainly not to have been singled out the special deprivation to which it is today held subject, and (5) the opposite result from the majority's, more consonant with the deep commitment of our jurisprudence to fair hearings as prerequisites to adverse determinations, is readily reconcilable with the text and essential objects of the pertinent statutory provisions." (A. 71-72).

Not only is the text of 5 U.S.C. §8506(a) readily reconcilable with the requirement of providing a fair hearing, especially "when construed in light of the purposes of the Act,"[59] but a fair examination of that statutory text alone compels a construction allowing for the right to a fair hearing. 5 U.S.C. §8506(a) generally provides that the various federal agencies shall make available to the states the "findings of the employing agency" concerning the "reasons for termination," and further provides that it is only the "findings" which are "final and conclusive." At the outset, it is readily apparent that the statute itself distinguishes between *findings*, on the one hand, and *reasons*, on the other, and

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[59] *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971).

that the statute directs that only the *findings* are to be *final and conclusive*. This obvious distinction plainly suggests that the process of making findings is different from a mere assertion of *ex parte* reasons, and that reasons alone are not entitled to final and conclusive weight. Although the appellees and the majority below dispute this plain distinction and interpret the word *findings* to mean *ex parte* reasons, their interpretation is contradicted by the common usage and judicial interpretation of the word *findings*. Ironically, their interpretation is also contradicted by the appellees' own usage of the words *findings* and *reasons* in the termination hearings provided to permanent federal employees.

In its most elementary form the word *findings* is derived from the judicial process and refers to those impartial resolutions or determinations made subsequent to or as part of deliberations upon all evidence fairly presented. See *Black's Law Dictionary*, 758 (4th ed. 1957), citing cases.[60] In administrative proceedings of an adjudicatory nature, the word *findings* has retained its essential judicial characteristics. For example, in drafting the Administrative Procedure Act, Congress used the word *findings* to denote determinations made after a hearing. 5 U.S.C. §557(c)(1), (2) & (3)(a). This common legal usage of the word *findings* has similarly been adopted by the courts in their interpretation and application of the word. See, *e.g.*, *Crowell v. Benson* 285 U.S. 22, (1932); *I.C.C. v. Louisville & Nashville R. Co.*, 227

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[60] The word *finding* is first defined as the "result of the deliberations of a jury or a court," and second, as a "decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, *referee*, coroner, etc." *Black's Law Dictionary*, 758 (4th ed. 1957) (emphasis added). Nowhere does the definition even approach an *ex parte* assertion of reasons by an interested party.

U.S. 88 (1913); *Sims v. Greene* 161 F.2d 87 (3rd Cir. 1947).

Perhaps the most significant use of the word *findings*, especially in view of the appellees' interpretation of 5 U.S.C. §8506(a), is found in the civil service regulations which provide the right to termination hearings to permanent federal employees.[61] Again, of course, the word *findings* is used to denote the impartial determinations made after a hearing before an impartial examiner, at which both the employer and employee have the opportunity to present evidence and to cross-examine witnesses. 5 C.F.R. §§771.208-771.213. In fact, the regulation concerning the report of the hearing examiner plainly distinguishes between findings made by the hearing examiner and mere reasons asserted by the parties to the hearings:

> "The examiner shall make a written report of his findings and recommendations. That report shall specify which of the reasons reviewed are found to be sustained and which are found to be not sustained, together with the conclusions drawn from those findings." 5 C.F.R. §771.213(a).

This distinction between findings and reasons is further clarified by another regulation which requires an employer, who is about to terminate a permanent employee, to provide that employee with "any and all reasons, specifically and in detail, for the proposed action." 5 C.F.R. §752.202(a)(1). Thus, not only does the language of 5 U.S.C. §8506(a) draw a distinction between *findings* and *reasons*, but the appellees' own regulations governing

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[61] See generally 5 C.F.R. §§752.201 *et seq.*, 5 C.F.R. §§771.101 *et seq.*, and 5 C.F.R. §§772.301 *et seq.*

civil service dismissals make plain that the two words are used to denote separate and distinct processes.[62]

This proper interpretation of 5 U.S.C. §8506(a), resulting from an isolated focus on the words *findings* and *reasons*, is buttressed by the only reasonable interpretation of the phrase in 5 U.S.C. §8506(a) which provides that "findings . . . are final and conclusive." In numerous instances this Court has construed various words and phrases providing for apparent final determinations so as to allow for review of those determinations which were not fairly made in the first instance.[63] For example, in

[62] To a limited extent, the appellees also recognize this distinction between *reasons* and *findings* in their application of 5 U.S.C. §8506(a) to permanent federal employees. For example, where a permanent employee applies for unemployment compensation and is also seeking to obtain reinstatement in his job through federal agency review and fair hearing procedures concerning the reasons for termination, the appellees have recognized that the mere *ex parte* assertions submitted to the state for unemployment compensation purposes should not be used, finally and conclusively, to disqualify the employee from compensation since the federal *findings* are yet to be made. Consequently, the appellees have adopted the position that "the State agency may not make a nonmonetary determination [against the permanent employee] until the personnel appeal relating to the UCFE claimant has been decided and the State agency has received a written notification from the former Federal employing agency or the U.S. Civil Service Commission on the disposition of the personnel action appeal." United States Department of Labor, Employment Security Manual, §6663 C. Unfortunately, however, the federal appellees have chosen to make this distinction between findings and reasons only for permanent employees. Moreover, their manner of making this distinction appears to conflict with the unemployment compensation "when due" requirement in 42 U.S.C. §503(a)(1). See *Pascua v. Hodgson*, No. 72-1720 (N.D. Cal., March 5, 1973).

[63] In addition to construing statutory provisions providing for apparent finality so as to allow for basic fairness, the Court also has frequently interpreted other statutory provisions so as to provide

Chin Yow v. United States, 208 U.S. 8 (1908), this Court held that a decision of the Department of Immigration and Naturalization could be "final" only if there had been a hearing held in good faith. Similarly, in *Crowell v. Benson*, 285 U.S. 22 (1932), where the Court was asked to determine whether a hearing officer's report could be final and conclusive consistent with the purposes of the Longshoremen's and Harbor Workers' Compensation Act, this Court stated that Congress could only provide for such finality, "assuming due notice, proper opportunity to be heard, and that findings are based on evidence." 285 U.S. at 47. See also, *Bridges v. Wixon*, 326 U.S. 135 (1945) where the Court held that the word "final" in the Alien Registration Act of 1940, 8 U.S.C. §155, did not bar review where a fair hearing had not been provided; *Estep v. United States*, 327 U.S. 114 (1946), where this Court held that final decisions of a selective service board (even after hearings) did not bar review of those decisions; *cf., Oestereich v. Selective Service System*

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for basic fairness or so as to avoid unduly harsh results. For example, in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) the Court construed designation "after appropriate investigation and determination" to require a hearing according to the essentials of due process. 341 U.S. at 138, n. 11. More recently, in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), this Court was faced with a section of the Immigration and Naturalization Act of 1952, 8 U.S.C. §101(a)(13), which defined "entry" of an alien to include entry after brief periods of absence. Noting that Congress had been concerned about liberalizing aliens' rights in the passage of the Act, this Court interpreted "entry" to cover only those entries which followed lengthy departures actually breaking residence in this country. Similarly, in *United States v. Rumely*, 345 U.S. 41 (1953) the Court construed the word "lobbying" to include only direct representational efforts directed at Congress rather than to unfairly cover all activities concerning the legislative process. See also, *Markham v. Cabell*, 326 U.S. 404 (1945).

Local Board No. 11, 393 U.S. 233 (1968).[64] In the same manner, the provision for finality in 5 U.S.C. §8506(a) cannot bar review in a state fair hearing where the alleged findings by the federal employers are actually no findings at all but rather only *ex parte* reasons asserted by the federal employers without providing for a fair hearing.

Accordingly, when the terms of 5 U.S.C. §8506(a) are examined apart from the legislative objectives and statutory mandates, the language alone compels a construction allowing for the right to a fair hearing. However, since "the terms . . . are to be construed to accomplish the purposes of the legislation," *United States v. Silk*, 331 U.S. 704, 713 (1947); *cf., California Department of Human Resources Development v. Java*, 402 U.S. 121, 133-134 (1971); and since the purposes of the legislation are to provide to all covered federal employees the same favorable conditions of employment as are given to other covered unemployed workers, to provide an effective wage substitute for all such unemployed workers, and to maximize the workers' opportunities to seek new employment, the only reasonable construction of 5 U.S.C. §8506(a) is one where *ex parte* reasons, which by definition are mere assertions made without a hearing, are not findings and hence are not and cannot be final and conclusive.

Two important principles of statutory construction further compel this proper interpretation of 5 U.S.C. §8506(a). One such principle requires remedial statutes

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[64] In *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968), this Court, interpreting "No judicial review" to allow limited judicial review, stated: "literalness in statutory language [may be] out of harmony either with constitutional requirements . . . or with an Act taken as an organic whole." 393 U.S. at 238 (citations omitted).

to be interpreted in favor of those for whom the statutes were intended to benefit. *Voris v. Eikel*, 346 U.S. 328, 333 (1953) (Longshoremen's and Harbor Workers' Compensation Act); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) (Federal Employer's Liability Act). Since the Social Security Act, as amended, is a remedial statute,[65] this Court has consistently construed the statute in favor of its beneficiaries, *California Department of Human Resources v. Java*, 402 U.S. 121 (1971); *United States v. Silk*, 331 U.S. 704 (1947); *Social Security Board v. Nierotko*, 327 U.S. 358 (1946); see also, *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943); *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358 (1939); *cf., Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946) (Railroad Unemployment Insurance Act).

A second principle of statutory construction requires that statutes be construed to avoid constitutional doubt. *Schneider v. Smith*, 390 U.S. 17, 26 (1968) citing a "stream of authority." Frequently the Court has applied this principle to require provision for a fair hearing. In *Greene v. McElroy*, 360 U.S. 474 (1959), this Court was faced with the issue of whether a government employee was required to have a hearing concerning his being barred from future employment with the government. In requiring that such a hearing be given the Court stated:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." 360 U.S. at 507.

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[65] See pp. 42-47, *supra*. See also *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-589 (1937); *cf., Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 515-518 (1937).

Similarly, in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), the issue before this Court was whether a hearing was required concerning administrative designation of an organization, "after appropriate investigation and determination," as a communist organization. There, this Court determined that a hearing was required:

> "The Executive Order, defining his powers, directs only that designation shall be made 'after appropriate investigation and determination.' This surely does not preclude an administrative procedure, however informal, which would incorporate the essentials of due process." 341 U.S. at 172 (Frankfurter J. concurring).

See also *The Japanese Immigrant Case*, 189 U.S. 86 (1903), where this Court interpreted the Immigration and Naturalization Act, which was silent on the issue of hearings, to require due process hearings in all deportation cases.[66] Application of this principle here requires

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[66] Not only has this Court interpreted statutes and executive actions to require due process hearings, in order to sustain their constitutionality, but the Court has also required adjudicatory administrative actions to conform to the fair hearing requirements of the Administrative Procedure Act, 5 U.S.C. §§554-559, even where the fair hearing procedures of the Administrative Procedure Act were not applicable to the administrative actions. Specifically, although 5 U.S.C. §554(a) requires fair hearing procedures only where "opportunity for an agency hearing" is first required by statute, this Court has required fair hearing procedures where the statutes at issue were silent with regard to hearings. See, *e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (fair hearing procedures required in deportation proceedings although the Immigration and Naturalization Act made no reference to opportunity for a hearing); *Cates v. Haderlein*, 189 F.2d 369 (7th Cir.), *rev'd per curiam*, 342 U.S. 804 (1951) (fair hearing procedures required in the issuance of fraud orders by the Post Office although

that 5 U.S.C. §8506(a) be properly interpreted so as to require a fair hearing on the issue most crucial to a worker's eligibility for unemployment compensation. A contrary interpretation, pursuant to which 5 U.S.C. §8506(a) would deny the right to a fair hearing to a limited group of former federal employees while providing that right to all other covered workers, would require this Court to hold that statute unconstitutional under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.

D. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER THE FEDERAL APPELLEES TO DETERMINE WHETHER THEY HAVE VIOLATED THE CONSTITUTION.

One final matter remains to be considered. In the three-judge court below the majority declined to consider the constitutional issues as against the federal appellees on the grounds that it was without subject matter jurisdiction under either 28 U.S.C. §1361 or 28 U.S.C. §1343(3). (A. 67). The majority's decision, reached without discussion or citation of authority, is plainly contrary to the decisions of this Court.

In 1962, Congress amended the Judicial Code by adding 28 U.S.C. §1361 to provide the district courts with *mandamus* jurisdiction:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel

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no statute required opportunity for a hearing); *Riss & Co. v. United States*, 96 F.Supp. 452 (W.D. Mo. 1950), *rev'd per curiam*, 341 U.S. 907 (1951) (fair hearing procedures required for the denial of motor carrier operating certificates by the Interstate Commerce Commission although no statute required opportunity for a hearing).

> an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiffs." 28 U.S.C. §1361.

The purpose of enacting 28 U.S.C. §1361 was simply to extend to all district courts the same power to grant relief against federal officials as was then available through common law *mandamus* in the United States District Court for the District of Columbia.[67]

The relief available through common law *mandamus*, now incorporated into 28 U.S.C. §1361, includes corrective orders against federal officials who have abused their discretion or acted contrary to law. See *Harmon v. Brucker*, 355 U.S. 579, 582 (1958) (*per curiam*). That such an order in the nature of mandamus can issue against federal officials who have acted contrary to the Constitution is unquestioned. In *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249 (1908), an action seeking *mandamus* relief against a federal official who had acted contrary to the requirements of due process, this Court made clear the appropriateness of *mandamus* relief:

> "[T]here is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." 211 U.S. at 262.

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[67] "The purpose of this bill, as amended, is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." S. Rep. No. 1992, 87th Cong., 2nd Sess., 2 (1962).

See also *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).[68]

In addition to its subject matter jurisdiction over the federal appellees pursuant to 28 U.S.C. §1361, the district court also had jurisdiction purusant to 28 U.S.C. §1343(3). Section 1343(3) provides that the district courts shall have jurisdiction over any civil action:

> "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 28 U.S.C. §1343(3).

Contrary to the majority opinion below, 28 U.S.C. §1343(3) does not speak of jurisdiction over state officials (A. 67), but rather it speaks of jurisdiction over cases involving unconstitutional deprivations "under color of any State law, statute, ordinance, regulation, custom or usage." A long line of decisions by this Court has firmly established that where unconstitutional deprivations are asserted, §1343(3) jurisdiction is properly had over non-state officials so long as there has been some *joint participation* by state officials under color of state law. See, *e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); *Shelley v. Kramer*, 334 U.S. 1, 17-20 (1948); *cf.*, *Griffin v. Breckenridge*, 403

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[68] See also *Peoples v. United States Department of Agriculture*, 427 F.2d 561, 565 (D.C. Cir. 1970); *National Association of Government Employees v. White*, 418 F.2d 1126, 1129 (D.C. Cir. 1969); *Long v. Parker*, 390 F.2d 816, 818-819 (3rd Cir. 1968); *Walker v. Blackwell*, 360 F.2d 66, 67 (5th Cir. 1966); *Ashe v. McNamara*, 355 F.2d 277, 282 (1st Cir. 1965).

U.S. 88, 96-99 (1971); *United States v. Price*, 383 U.S. 787, 794 (1966). And just as such jurisdiction is properly found over non-state officials who are private persons, such jurisdiction is properly found over non-state officials who are federal officials, so long as there has been some *joint participation* by state officials under color of state law. *Kletschka v. Driver*, 411 F.2d 436, 448-449 (2nd Cir. 1969); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 580 (4th Cir. 1966); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 967 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

That the deprivation here is the result of joint participation between state and federal officials is apparent from only a brief review of the statutes involved. Since the New York Secretary of Labor has entered into an agreement with the United States Secretary of Labor (A. 42-43), not only are federal services and wages assigned to New York, 5 U.S.C. §8504, but New York is required to administer the UCFE program under "the same terms and subject to the same conditions" as are applicable under its law as an "agent of the United States," 5 U.S.C. §8502. The unconstitutional deprivations which have resulted from the state and federal appellees' joint administration, interpretation and enforcement of the UCFE program are sufficient for 28 U.S.C. §1343(3) to provide the district court with subject matter jurisdiction over the federal appellees.

CONCLUSION

The judgment of the three-judge court below should be reversed, and a judgment should be entered construing 42 U.S.C. §503(a)(1) & (3) and 5 U.S.C. §§8501-8508 to require an opportunity for a fair hearing for purposes of unemployment compensation for all former federal probationary employees who did not resign, or a judgment should be entered holding 5 U.S.C. §8506(a), as interpreted by the appellees, to be unconstitutional.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions, Statutes and Regulations Involved

U.S. Const. Amend. V, provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. XIV, §1, provides in relevent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §503 provides in relevant part:

> §503. State laws, provisions required; stopping payments on failure to comply with law
>
> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for–
>
> (1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation when due; and
>
> * * * * *
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

5 U.S.C. §§8501-8508 provide in relevant part:

> §8501. Definitions

For the purpose of this subchapter–

* * * * *

(3) "Federal employee" means an individual who has performed Federal Service.

8502. Compensation under State agreement

(a) The Secretary of Labor, on behalf of the United States, may enter into an agreement with a State, or with an agency administering the unemployment compensation law of a State, under which the State agency shall–

(1) pay, as agent of the United States, compensation under this subchapter to Federal employees; and

(2) otherwise cooperate with the Secretary and with other State agencies in paying compensation under this subchapter.

(b) The agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State if his Federal service and Federal wages assigned under section 8404 of this title to the State had been included as employment and wages under that State law.

* * * * *

(d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

§8503. Compensation absent State agreement

(a) In the case of a Federal employee whose Federal service and Federal wages are assigned under section 8504 of this title to a State which does not have an agreement with the Secretary of Labor, the Secretary, under regulations prescribed by him, shall, on the filing by the Federal employee of a claim for compensation under this subsection, pay compensation to him in the same amount, on the same terms, and subject to the same conditions as would be paid to him under the unemployment compensation law of the State if his Federal service and Federal wages had been included as employment and wages under that State law. However, if the Federal employee, without regard to his Federal service and Federal wages, has employment or wages sufficient to qualify for compensation during the benefit year under that State law, then payments of compensation under this subsection may be made only on the basis of his Federal service and Federal wages.

* * * * *

(c) A Federal employee whose claim for compensation under subsection (a) or (b) of this section is denied is entitled to a fair hearing under regulations prescribed by the Secretary. A final determination by the Secretary with respect to entitlement to compensation under this section is subject to review by the courts in the same manner and to the same extent as is provided by section 405(g) of title 42.

§8504. Assignment of Federal service and wages

Under regulations prescribed by the Secretary of Labor, the Federal service and Federal wages of a Federal Employee shall be assigned to the State in which he had his last official station in Federal service before the filing of his first claim for compensation for the benefit year. However–

(1) if, at the time of filing his first claim, he resides in another State in which he performed, after the termination of his Federal service, service covered under the unemployment compensation law of the other State, his Federal service and Federal wages shall be assigned to the other State;

(2) if his last official station in Federal service, before filing his first claim, was outside the United States, his Federal service and Federal wages shall be assigned to the State where he resides at the time he files his first claim; and

(3) if his first claim is filed while he is residing in the Virgin Islands, his Federal service and Federal wages shall be assigned to the Virgin Islands.

§8505. Payments to States

(a) Each State is entitled to be paid by the United States an amount equal to the additional cost to the State of payments of compensation in accordance with an agreement under this subchapter which would not have been made by the State but for the agreement.

(b) Each State shall be paid, either in advance or by way of reimbursement, as may be determined by the Secretary of Labor, the sum that the Secretary estimates the State is entitled to receive under this subchapter for each calendar month. The sum shall be reduced or increased by the amount which the Secretary finds that his estimate for an earlier calendar month was greater or less than the sum which should have been paid to the State. An estimate may be made on the basis of a statistical, sampling, or other method agreed on by the Secretary and the State agency.

(c) The Secretary, from time to time, shall certify to the Secretary of the Treasury the sum payable to each State under this section. The Secretary of the Treasury, before audit or settlement by the General

Accounting Office, shall pay the State in accordance with the certification from the funds for carrying out the purposes of this subchapter.

* * * * *

(h) For the purpose of payments made to a State under subchapter III of chapter 7 of title 42, administration by a State agency under an agreement is deemed a part of the administration of the State unemployment compensation law.

§8506. Dissemination of information

(a) Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

(1) whether or not the Federal employee has performed Federal service;

(2) the periods of Federal service;

(3) the amount of Federal wages; and

(4) the reasons for termination of Federal service.

The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of

sections 8502(d) and 8503(a) of this title. This subsection does not apply with respect to Federal service and Federal wages covered by subchapter II of this chapter.

(b) The agency administering the unemployment compensation law of a State shall furnish the Secretary such information as he considers necessary or appropriate in carrying out this subchapter. The information is deemed the report required by the Secretary for the purpose of section 503(a)(6) of title 42.

§8508. Regulations

The Secretary of Labor may prescribe rules and regulations necessary to carry out this subchapter and subchapter II of this chapter. The Secretary, insofar as practicable, shall consult with representatives of the State unemployment compensation agencies before prescribing rules or regulations which may affect the performance by the State agencies of functions under agreements under this subchapter.

20 C.F.R. §§609.1 *et seq.* provide in relevant part:

§609.6 Federal findings on Form ES–931.

(a) Within 4 work days after receipt from a State agency or the Secretary of a Form ES–931 a Federal agency shall make its Federal findings, complete all copies of the form, and transmit its Federal findings to the State agency or the Secretary, as appropriate, on such form or as a part thereof. If documents necessary for completion of a Form ES–931 have been assigned to an agency records center or the Federal Records Center in St. Louis the Federal agency shall obtain the necessary information from the records center. Any records center shall give priority to such request.

(b) If a completed Form ES–931 cannot be returned within 4 work days of receipt the Federal agency immediately shall inform the State agency or the Secretary, as appropriate, and shall include an estimated date by which the completed form will be returned.

(c) Each Federal agency shall maintain a control of the Forms ES–931 received by it that will enable it to ascertain at any time the number of such forms that have not been returned to the requesting State agency or the Secretary and the date of the Federal agency's receipt of such unreturned forms.

§609.11 Appeal by Federal agency.

If a terminating Federal agency believes that a State agency's determination awarding or denying compensation is incorrect the Federal agency, unless otherwise prohibited by law, may appeal from such determination in the same manner and to the same extent as other employers may appeal under the applicable State unemployment compensation law except that a Federal agency may not appeal from the findings of another Federal agency.

§609.18 Finality of Federal findings.

(a) Federal findings under §609.6 or §609.7 shall be final and conclusive except that Federal Findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under §609.23.

(b) Additional information submitted by a Federal agency under §609.8 shall be considered part of the original Federal findings which, as so supplemented, shall be final and conclusive, as provided in paragraph (a) of this section.

(c) Federal findings which after reconsideration under §609.9 have been affirmed, modified, or reversed by the Federal agency shall be final and conclusive, as provided in paragraph (a) of this section.

§609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under §609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

N.Y. Labor Law §620 provides in relevant part:

§620. Referees' hearings

1. Disputed claims for benefits (a) A claimant who is dissatisfied with an initial determination of his claim for benefits or any other party affected by such determination may, within thirty days after the mailing or personal delivery of notice of such determination, request a hearing.

28 U.S.C. §1343 provides in relevant part:

§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. §1361 provides:

§1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANITA SMITH,)
)
Plaintiff,)
)
v.)
)
Civil Action
No. 2232-68
)
DISTRICT UNEMPLOYMENT)
COMPENSATION BOARD,)
)
Defendant.)

MEMORANDUM OPINION

This is an action to review a final decision of the District Unemployment Compensation Board under 46 D.C. Code §312. Plaintiff was employed as a personnel clerk at the Washington Navy Yard. She resigned for the following then-stated reasons:

> "I am resigning because of poor transportation, poor military supervisory-employee relations and uncongenial working conditions. My advancement in this position was intensely impeded by (Personal Prejudice) in this department."

The Navy made a finding at the time as follows:

> "Investigation failed to support allegations of employee."

When plaintiff's claim for unemployment compensation was presented to the Board's Claims Deputy, he disqualified her claim for five weeks on the ground that plaintiff's voluntary termination was, in the words of the

applicable regulation, "without good cause, in the light of all such facts, conditions, and circumstances as are relevant to the particular case." Plaintiff appealed to the Board's Appeals Examiner and a hearing was held on July 25, 1968. Plaintiff appeared and testified, elaborating her reasons and giving additional grounds for resignation in an effort to show good cause. No contrary evidence was taken. The Appeals Examiner concluded on the basis of the Navy's finding that good cause for leaving was not shown and that the action of the Claims Deputy was correct and affirmed. This decision then was appealed unsuccessfully to the District Unemployment Compensation Board. The parties now bring the matter before the Court on cross-motions for summary judgment.

Plaintiff contends she was denied due process of law under the Fifth Amendment in that she never received a real hearing on the merits of her case. Plaintiff as an employee of a federal agency is governed in making her claim for unemployment compensation by 5 U.S.C. §§8501 *et seq*. Since the Secretary of Labor pursuant to 5 U.S.C. §8502 has entered into an agreement with the District Unemployment Compensation Board, any claim by a federal government employee in the District is determined under the provisions of 46 D.C. Code §§301 *et seq*. However, 5 U.S.C. §8506 states, for the purposes of this case, that the findings of the federal agency as to the reasons for termination of employment shall be final and conclusive upon the District Board. Neither the statute nor the regulations issued thereunder describe any procedure by which the federal agency is to make its findings and no hearing is required.

In this case the Navy informed the District Board that plaintiff's allegations were not supported by its investigation. Since in the case of a federal employee the only task of the Board is to take the facts as found by the

federal agency and apply to them the District's standards for compensation, the Navy's finding here effectively precluded any result other than the one reached by the Claims Deputy. When he disqualified her claim for five weeks she appealed and pursuant to 46 D.C. Code §311(e) a hearing was held before the Appeals Examiner; but this was not a hearing such as one afforded a private employee or an employee of the District of Columbia Government. Plaintiff gave evidence but the Navy did not appear. Then, on the basis of the Navy's finding, the Appeals Examiner affirmed the denial of her claim since the facts as found by the federal agency were accepted as final and conclusive.*

Counsel could point to no specific provision requiring a hearing on the facts before the Navy. Although an ex parte determination by the federal agency may be sufficient to guide the decision of the Claims Deputy, surely when an appeal is taken to the Appeals Examiner the claimant cannot be foreclosed from testing these ex parte findings. To hold otherwise would be to cast doubts upon the constitutionality of the the statute or the implementing regulations due to the denial of due process of law. Federal claimants who appeal under 46 D.C. Code §311(e), if they have not been given a hearing before the federal agency in order to determine the reasons for termination, must be given a due process hearing in front of the District Board or its representatives as are other claimants. *Greene v. McElroy*, 360 U.S. 474 (1959).

---

*It should be noted that Regulation III-A of the District Board states:

"Ordinarily a leaving will be presumed to be *involuntary* on the part of the claimant unless the facts clearly indicate otherwise. Where it appears that the leaving was voluntary, the burden of proof shall be on the claimant to establish good cause."

The defendant's motion for summary judgment is denied. The plaintiff's motion is granted in part and this case is remanded to the District Unemployment Compensation Board for a hearing consistent with the terms of this opinion.

Order to be presented.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 17, 1969

[Caption Omitted in Printing]

ORDER

The Court, after hearing counsel and considering briefs of the parties supporting their cross-motions for summary judgment, having filed a Memorandum Opinion dated July 17, 1969, it is this 29th day of July, 1969,

ORDERED that:

1. Defendant's motion for summary judgment is denied.

2. Plaintiff's motion for summary judgment is granted in part. This matter is remanded to the District Unemployment Compensation Board to hold a hearing in the above-captioned case for the purpose of determining the reasons for the plaintiff's terminating her employment with the Department of the Navy and further to determine, based on the evidence adduced at said hearing, whether the plaintiff's leaving her employment was for or without cause. The District Unemployment Compensation Board is directed to make an independent decision based solely on evidence produced at said hearing and the

District Unemployment Compensation Board shall not be bound in any respect by any decision of the Department of the Navy as to the reasons for plaintiff's terminating her employment. In other respects plaintiff's motion is denied.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Caption Omitted in Printing]

AMENDED ORDER

Upon consideration of the decision of the United States Court of Appeals dated August 28, 1970, affirming with modification this Court's order dated July 17, 1969, and upon consideration of plaintiff's proposed Amended Order, of defendant's opposition thereto, and of a memorandum filed by the United States Attorney indicating that the Department of the Navy has no procedures for an evidentiary hearing on the question whether plaintiff's resignation was voluntary but does not object to the Court striking the Navy's finding of voluntary separation from plaintiff's record, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the finding of the Navy Department that its "investigation failed to support allegations of plaintiff" be striken from the document entitled "Reason for Separation or Non-Pay Status"; and it is further

ORDERED that the District Unemployment Compensation Board shall conduct such hearings and make such findings as are required by 46 D.C. Code §§310, 311, with respect to plaintiff's eligibility for benefits, and that such findings shall be made without regard to any finding by the Department of the Navy regarding the reasons for plaintiff's separation; and it is further

ORDERED that this action shall be stayed pending decision on plaintiff's claim by the District Unemployment Compensation Board.

This Amended Order shall supersede the Order issued by the Court in this case on July 17, 1969.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

January 28, 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN AND VICTOR L. GREEN, *Appellants*,
v.
NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,
Appellees.

On Appeal From the United States District Court for the Southern District of New York

BRIEF AMICI CURIAE FOR NATIONAL ASSOCIATION OF LETTER CARRIERS (AFL-CIO) AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO)

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June 14, 1973

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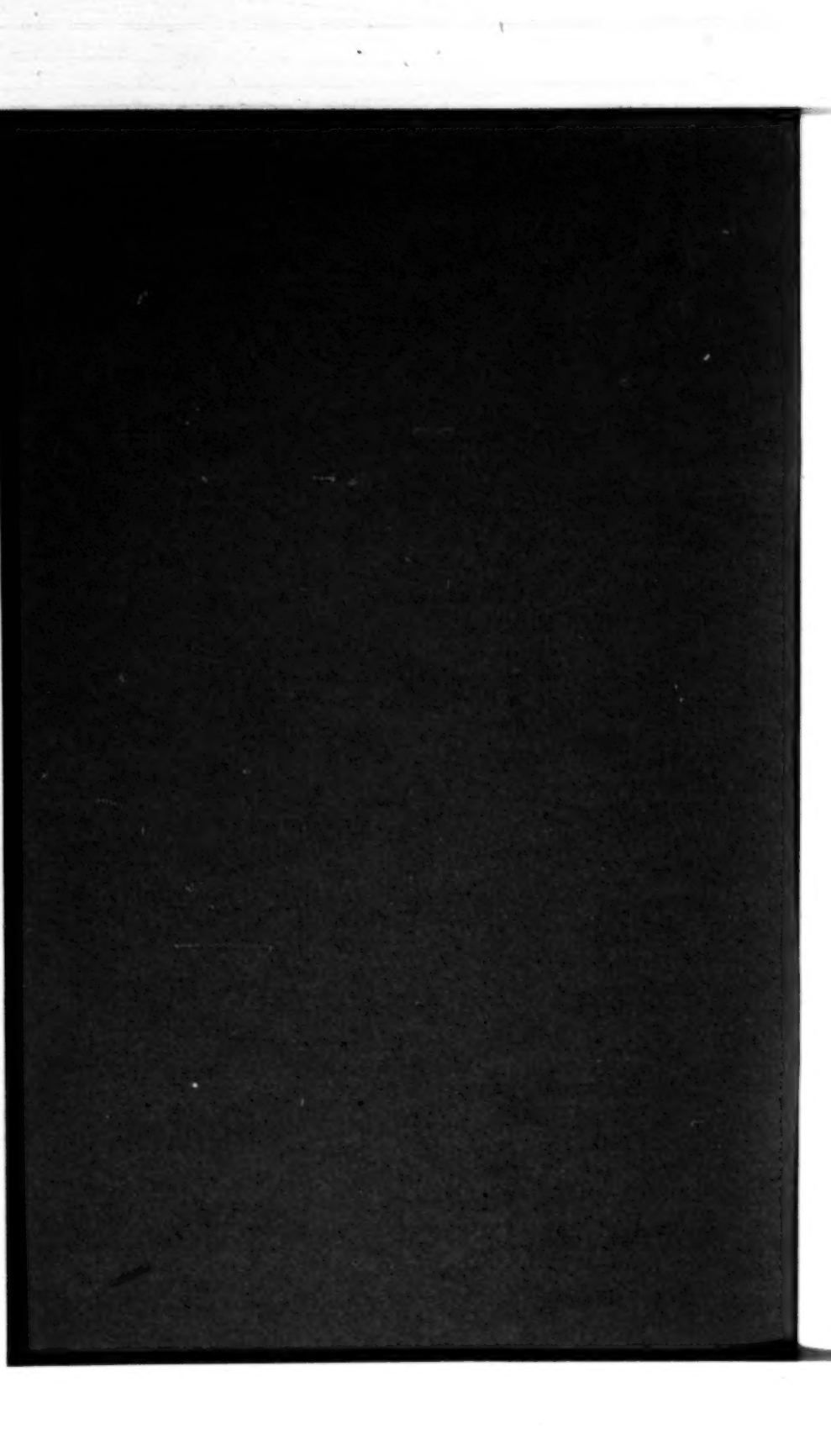

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN AND VICTOR L. GREEN, *Appellants*,

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*, *Appellees.*

On Appeal From the United States District Court for the Southern District of New York

---

BRIEF AMICI CURIAE FOR NATIONAL ASSOCIATION OF LETTER CARRIERS (AFL-CIO) AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO)

INTEREST OF THE AMICI

The National Association of Letter Carriers, AFL-CIO ("NALC") is an unincorporated association and labor union with approximately 220,000 members. It is the exclusive bargaining representative of 202,000 city letter carriers of the United States Postal Service, an independent establishment of the Executive branch of the government of the United States. These city

letter carriers include both permanent and probationary employees.

The American Federation of Government Employees, AFL-CIO ("AFGE") is an unincorporated association and labor union with approximately 325,000 members, who are civilian permanent and probationary employees of the Federal and District of Columbia Governments. AFGE is the largest labor organization of non-postal federal employees, and is the exclusive representative of approximately 650,000 civilian government employees, including so-called blue collar, white collar, and professional classes of employees dispersed through every major department and agency of the Federal Government.

In their capacities as exclusive bargaining representatives the amici deal with management of the Postal Service and other government agencies on grievances, personnel policies and other matters affecting working conditions of the employees they represent, including probationary employees. They are therefore keenly interested in the rights of federal probationary employees to receive unemployment compensation benefits to which they are entitled, and fair procedures for ascertaining their entitlement.

ARGUMENT

Federal Probationary Employees Are Entitled by Statute to a Hearing on the Reasons for Their Termination If Those Reasons Are Asserted as the Basis for Denying Their Eligibility for Unemployment Compensation.

The question in this case is whether federal probationary employees may lawfully be denied eligibility for unemployment compensation benefits absent a fair hearing with respect to the reasons for the termination of their federal employment, where those reasons are

the basis for denying eligibility. The court below by a divided vote decided that question in the affirmative, rejecting plaintiffs' claims that some form of hearing is required both by the applicable statutes and the Fifth Amendment to the United States Constitution. We submit, in accord with the dissent below (A. 71-78) and the decision of the Court of Appeals for the District of Columbia in *Smith* v. *District Unemployment Compensation Board,* 435 F.2d 433 (hereafter sometimes referred to as "*Smith*"), that the result reached below is contrary to the statutory scheme. Accordingly, the constitutional issue need not be reached, compare, e.g., *California Department of Human Resources* v. *Java,* 402 U.S. 121 124.[1]

1. A brief description of the statutory scheme is a necessary predicate to our discussion. The Social Security Act of 1935, 49 Stat. 626, 42 U.S.C. §§ 501 *et seq.*, created the unemployment compensation system. The background and purpose of the unemployment compensation program is fully described in *Java* (402 U.S. at 129-133), and need not be repeated here. Originally, federal employees were expressly excluded from coverage. However, in 1954 Congress amended the Social Security Act to extend unemployment compensation to substantially all civilian employees;[2] as the Court of Appeals said in *Smith:*

---

[1] In limiting our discussion to the statutory issue we do not intend to imply disagreement with appellants' constitutional contentions. On the contrary, as we develop below, these are so substantial that they fortify the statutory interpretation which we urge.

[2] These amendments were embodied in Title XV of the Social Security Act of 1954, §§ 1501 *et seq.*, 68 Stat. 1130 *et seq.* With certain technical amendments adopted in 1958, 1960, 1966 and 1967 these provisions are now codified as 5 U.S.C. §§ 8501-8508.

> "Congress was keenly aware that Federal employees face risks of unemployment, since there had been a substantial drop in Federal employment between June 1952 and 1954, just as there had been a drop beginning in 1945 following the peak of World War II." 435 F.2d at 436.

See also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer). In thus eliminating "the discrimination that has been practiced by the Federal Government against its Federal civilian employees" and assuring "all of our citizens that they will be equally covered should they be so unfortunate as to become unemployed,"[3] Congress did not distinguish between permanent and probationary employees.[4]

The present controversy centers around the procedures for determining eligibility for unemployment compensation benefits. Two alternative procedures are established. The first provides for administration of unemployment compensation to Federal employees by the States, pursuant to agreements reached with the Secretary of Labor. Under this provision, 5 U.S.C. § 8502, the State must agree that compensation to a Federal employee will be paid by the State "on the same terms, and subject to the same conditions as the compensation which would be available to him under the unemployment compensation law of the State if his Federal service and Federal wages * * * had been included as employment and wages under that state law." 5 U.S.C. § 8502(b). 5 U.S.C. § 8502(d) provides for

---

[3] 100 Cong. Rec. 10079 (1954) (remarks of Rep. Springer).

[4] This proposition is not disputed. See S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 7 (1954).

review of the State agency's determination in the same manner and to the same extent as review is provided under the State unemployment compensation law. The alternative procedure, embodied in 5 U.S.C. § 8503, which is operative in the absence of an agreement with the State to which the Federal employee's Federal service and Federal wages are assigned (as determined by 5 U.S.C. § 8504), vests responsibility for administering benefits in the Secretary of Labor. Under both procedures the employee is entitled to a hearing on his eligibility. If § 8502 applies, the State procedures are governed by 42 U.S.C. § 503(a)(3) which, tracing back to § 303 of the 1935 Act, requires the States to provide "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." And if § 8503 applies, the first sentence of subsection (c) provides that the employee "is entitled to a fair hearing under regulations prescribed by the Secretary."

The provision which was held by the majority below to authorize denial of eligibility without a hearing on the reasons for the employee's termination, is 5 U.S.C. § 8506(a). This provides that the Federal employing agency shall make available to the State agency (or the Secretary of Labor, as the case may be) information concerning the employee's Federal service and wages, and specifically its findings concerning "the reasons for termination of Federal service." It further provides:

> "The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in ac-

cordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c)."

2. In *Smith* v. *District Unemployment Compensation Board,* 435 F.2d 433 (C.A.D.C.), the Court concluded that

> "it was the contemplation of Congress that no finding by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing before an impartial tribunal." *Id.* at 438.[5]

[5] The plaintiff in *Smith* was a permanent employee who had resigned, but contended that she had done so under circumstances which did not make her ineligible for unemployment compensation; the employing agency had made a finding that "investigation failed to support allegations of employee" (435 F.2d at 435). Neither the majority nor the dissent in the present case took the view that this difference in circumstances was at all relevant; this was clearly sound, since there was nothing in the *Smith* opinion which distinguishes the situations of the permanent employee who resigns (and has no hearing on his termination for that reason) and the probationary employee who is separated by the agency. Accordingly, the Court of Appeals stated that *Smith*

> "involves an issue of the procedure required where a person seeking unemployment compensation payable under state law (here, the law of the District of Columbia), following the termination of Federal employment, finds compensation denied or curtailed because of findings of the employing (Federal) agency made in the absence of a hearing." *Id.* at 434.

Nevertheless, under the present state of the law the applicable regulations do distinguish between the right to a hearing of employees who resign, and those who are terminated. 20 C.F.R. § 609.18(a) now provides:

> "Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the

In this case, however, the majority of the District Court expressly "refuse[d] to follow the construction of 5 U.S.C. § 8506 set forth in *Smith*, supra." (A. 66). It said that "the idea that the use of the word 'findings' in 5 U.S.C. § 8506 means 'findings after a hearing' is a tortured, strained and unnecessary interpretation." (A. 67). But to the extent that the language of the Act supports either construction, the better view is that of the dissenting judge below, that the "very word 'findings' buttresses th[e] inference" that some form of hearing is required:

> "If it is not inescapably true, the word commonly refers to resolutions or determinations following deliberations upon evidence in a manner of which the judicial process is the ideal case. See Black's Law Dictionary 758 (4th ed. 1957), citing cases. If the probable image is not always of a full-scale trial 'hearing,' it is certainly not of the simple assertion of a 'fact' or merely 'the conclusory statement of a result' where there has been no opportunity for countervailing presentations and no pretense of considering two sides. *Coleman* v. *Brucker*, 257 F.2d 661, 662-663 (D.C. Cir. 1958); *Sims* v. *Greene*, 161 F.2d 87, 89 (3d Cir. 1947)." (A. 74)

---

alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23."

This regulation was evidently a response to the *Smith* case. It was promulgated on July 20, 1971, 36 Fed. Reg. 1130, replacing an earlier version which had read simply:

> "Federal findings under § 609.6 or 609.7 shall be final and conclusive." 20 C.F.R. § 609.18(a), 32 Fed. Reg. 20969 (Dec. 29, 1967).

The *Sims* case, *supra*, is particularly in point, for there Judge Biggs construed the requirement for "findings" in Rule 52(a) of the Federal Rules of Civil Procedure—perhaps the most familiar provision of federal law employing that term—to imply the necessity for a hearing:

> "If anything more was required to indicate with certainty that a preliminary injunction may not issue without giving the party sought to be enjoined an opportunity to present evidence on his behalf, it is furnished by the provisions of Rule 52(a) which requires the court, in all actions 'tried upon the facts without a jury' to state separately its conclusions of law and 'in granting or refusing interlocutory injunctions' 'similarly [to] set forth the findings of fact and conclusions of law which constitute the grounds of its action.' The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence. Finding facts requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both." 161 F.2d at 89.

Thus, whereas the majority below regarded it as "tortured, strained and unnecessary" to infer the right to a hearing from the requirement that findings be made, Judge Biggs in *Sims* regarded the same "conclusion" to be "inescapable."

In short, Judge Frankel was surely right in saying that " 'findings' fits at best crudely the ex parte declaration upon which plaintiffs were dismissed." (A. 75). Indeed, we suggest that he was more generous to the majority's view than consistent with his own when

he conceded that "neatly or not, the word does fit" and that "[i]f textual analysis were the whole of our responsibility, plaintiffs would probably deserve to lose." (*Id.*) In any event, while we think that the language is at the very least indicative of a Congressional understanding that the controlling "findings" should be something more than a mere statement of his reason by the person responsible for the probationary employee's termination, the least that must be granted is that the term cannot be read to *negate* the requirement for a hearing if the other tools of statutory interpretation point to that result.

The majority charged that the *Smith* court had "ignor[ed] the structure of the Federal Civil Service Laws," wherein "Congress has made a distinction between probationary and permanent Government employees" (*id.*). Building on that proposition, the majority reasoned that the 1954 Congress was aware that "[p]robationary employees are not entitled to the full range of hearing rights to which permanent employees are entitled upon dismissal" (*id.*) and that "Congress intended that Federal employers should have an unfettered right to terminate probationary employees up to the time such employees acquire permanent status" (*id.*) That right, the majority feared, would be restricted in its exercise if a hearing were required where unemployment compensation eligibility was at issue:

> "No termination hearing is prescribed or required nor should it be. What *Smith*, *supra*, attempts is to legislate judicially a hearing not now required by statute which would mandate precisely the type of hearing not now required for discharge. Such a hearing, as a practical matter, would limit the

> Government in the discharge of probationary employees to an extent never previously contemplated by the Congress." (A. 66-67).

This argument is compellingly refuted by the dissent:

> "It should be stressed, * * * that nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation. When the majority speaks of what is foreseen 'as a practical matter,' it evidently reflects the concern, exhibited in arguments to us for defendants, that the prospect of a hearing—even though not testing the discharge or capable of doing so—would make supervisors in the employing agencies timorous about discharging probationary people. This is a regrettable position. Insofar as it is accurate, it portrays a regrettable situation. We ought not to be so 'practical' that we fashion legal judgments upon the premise that federal officials commonly fire people upon grounds so tenuous that they would not dare order the firings if they thought someone, somewhere else, without authority to reverse the firings, might so much as air the asserted grounds." (A. 76, n. 7, emphasis in original).

To this we need add only one important point. There is no indication whatsoever that the 1954 Congress shared the District Court's assumptions regarding the practicalities of personnel administration. It is therefore to "legislate judicially" (cf. A. 66) to give those unexpressed administrative considerations priority over the avowed and benign purpose of the 1954 amendments to the Social Security Act—to afford federal employees unemployment compensation on the same terms as those provided for private employees.

We do not suggest that the Civil Service laws should be disregarded; and Judge Leventhal cannot fairly be charged with having done so.[6] But his opinion in *Smith* went further and carefully considered the purpose of the 1954 amendments and their context in prior unemployment compensation law (436 F.2d at 436-438). This analysis was summarized as follows:

> "The intention of the 1954 enactment was to put the Federal employee whose employment was terminated in the same general position as a private employee, both being governed by the same principles of State law as to eligibility for compensation.
>
> Congress assured a fair hearing to Federal employees governed by § 8502 (for their claims are considered by the State agency which is under a general mandate to provide fair hearings for private employees), and to Federal employees governed by § 8503, since § 8503(c) provides: 'A Federal employee whose claim for compensation * * * is denied is entitled to a fair hearing under regulations prescribed by the Secretary.' These provisions must be taken into account in considering the intention of that language of § 8506 which states that the findings of Federal agencies shall be final and conclusive." (*Id.* at 438).

On the other hand, the court below "ignored the structure of" (A. 66) the *unemployment compensation laws,* particularly the right to a hearing on eligibility, which has been part of the unemployment compensation system from the beginning. And while preserving the

---

[6] Not only does Judge Leventhal's reasoning take account of Civil Service procedures (435 F.2d at 438), but he took pains to modify the District Court's judgment to allow those procedures to be followed (*id.* at 439).

distinction between permanent and probationary federal employees the court gave no heed to the basic policy of the 1954 amendments to establish equality between federal civilian employees and non-governmental workers. It is this fundamental difference in the methods of the two courts that explains the difference in the results reached. For, in light of that policy, the *Smith* court was clearly correct in concluding that:

> "There is no reasonable basis for supposing that whereas Congress deliberately insisted on opportunity of hearing for employees generally, it deliberately established a no-hearing enclave for a relatively small group of Federal employees. . . ." 435 F.2d at 438.[7]

3. There is an additional reason for construing 5 U.S.C. §8506 as authorizing the use of federal findings to deny eligibility only if those findings are based upon a hearing: that construction would avoid serious doubts that the statutory scheme is consistent with the

---

[7] The result which we urge can be readily accomplished by amending the governing regulation, 20 C.F.R. § 609.18, to read as follows:

> "Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation *or the reasons given to the employee for his separation* or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23."

The italicized phrase is all that needs to be added to the present regulation as revised in light of *Smith*. See pp. 6-7, n.5, *supra*.

probationary employees' rights to due process and equal protection of the laws under the Fifth Amendment. It appears from its opinion that the District Court did not

> "remember that, [w]hen the validity of an act of the Congress is drawn in question, and * * * a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *United States* v. *Thirty-seven (37) Photographs*, 402 U.S. 363, 369, following *Crowell* v. *Benson*, 285 U.S. 22, 62.

In any event, the Court's analysis of the constitutional issues is so flawed, that it could not begin to give appropriate weight to those issues in determining the meaning of the statute.

a. In disposing of the equal protection contention the court below "reiterate[d] what we have previously stated, [that] Congress had good reason to differentiate between probationary and permanent employees in trying to promote the efficient disposition of Federal business." (A. 68). But this is merely to carry over to the constitutional context the Court's mistaken approach to the statute. For, the issue herein is not whether a distinction may constitutionally be drawn between probationary and permanent employees in affording a hearing on discharge. It is rather whether that distinction is constitutionally supportable where the issue to be resolved at the hearing is eligibility for unemployment compensation benefits.

We assume for purposes of this argument that the Constitution does not require probationary and per-

manent employees to be given the same hearing rights on the reasons for their discharge; the difference in their status relates precisely to their job security. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564; *Perry* v. *Sindermann*, 408 U.S. 593. But here the hearing is sought to protect rights to unemployment compensation, as to which the difference in status is irrelevant in principle as well as in the contemplation of Congress.

As this Court recently said in *Reed* v. *Reed*, 404 U.S. 71:

> "The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)." 404 U.S. at 75-76.

Thus, the District Court's attempted justification of the classification between probationary and permanent employees is, for present purposes, constitutionally untenable. And even if the involvement of the states in this case were deemed insufficient to bring the Fourteenth Amendment into play—a theory not invoked by the District Court—there would be at least a substantial question whether the discrimination is "so unjustifiable as to be violative of due process" and thus forbidden by the Due Process clause of the Fifth Amendment. See *Shapiro* v. *Thompson*, 394 U.S. 618, 641; *Schneider* v. *Rusk*, 377 U.S. 163, 168.

b. With respect to the due process issue the analysis of the court below also suffers from a fundamental flaw. The Court regarded the case as if it were controlled by its decision in *Torres* v. *New York Department of Labor*, 321 F. Supp. 432 (S.D.N.Y.), vacated and remanded, 402 U. S. 968 (1971), previous decision adhered to, 333 F. Supp. 341 (S.D.N.Y.), affirmed 405 U.S. 949, rehearing denied, 410 U.S.—:

> "In the case at bar plaintiffs have not received benefits but have only applied for them. In fact, a three-judge panel of this Court has held that the suspension or termination without a prior hearing of *unemployment compensation benefits* already being paid *without a prior hearing* is not violative of the Fourteenth Amendment. [Citing *Torres*] That Court pointed out that the 'brutal need' of the welfare recipients in *Goldberg* [v. *Kelly*, 397 U.S. 254] was not present in circumstances involving recipients of unemployment compensation. The same Government interest in the efficient operation of the unemployment compensation program which was present in *Torres*, is present here. On balance, the interests of the Government outweigh plaintiffs' need for a hearing and so the due process claim cannot be sustained." (A. 69-70, emphasis in original).

But the issue here is not whether unemployment compensation benefits may be denied or withdrawn *"without a prior hearing"* (A. 70, emphasis in original), as in *Torres* and *Indiana Employment Division* v. *Burney*, 409 U.S. 540; it is whether these may be finally denied without any form of hearing *at any time* on an issue which "the statutory scheme makes * * * an important factor in the State's determination" of eligibility, *Bell* v. *Burson*, 402 U.S. 535, 541. That these are different problems was explicitly pointed out in

Lindsey v. *Normet*, 405 U.S. 56, 66-67, and *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82. It is, we submit, beyond debate.

The claimant's right to a hearing at some time was not questioned either in *Goldberg* or in *Torres* and *Burney*. Thus, even if "unemployment compensation benefits are not of the same urgent nature to the survival of the claimant as are welfare benefits" (A. 69), this is not pertinent here; the urgency of the claimant's need was relied on in *Goldberg* to establish a right to a hearing at a particular time—before withdrawal of benefits. But once the existence of a property interest is established, due process requires a hearing in some form at some time except in the most extraordinary situations, not remotely present here. See e.g., *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571; *Perry* v. *Sindermann*, 408 U.S. 593, 599-603; *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886.[8] And the existence of a property right to unemployment compensation benefits is established. For, it is "a contractual right". *California Department of Human Resources Development Co.* v. *Java*, 402 U.S. 121, 131, quoting Report of the Committee on Economic Security, Hearings on S. 1131 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1321-1322 (1935).

We referred at the outset of this section to the principle that federal statutes are to be so construed

[8] It cannot possibly be contended that the property interest of appellants is as slight ("the opportunity to work at one isolated and specific military installation") or the government interest as substantial and unique ("as proprietor, to manage the internal operation of an important federal military establishment") as those were characterized in *Cafeteria Workers*. 367 U.S. at 896.

as to avoid serious doubt of their constitutionality. That general principle has been applied with particular vigor where the constitutional claim is the right to procedural due process. As was said in *Greene* v. *McElroy*, 360 U.S. 474:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See e.g., *The Japanese Immigrant Case (Kaoru Yamataya* v. *Fisher)*, 189 U.S. 86, 101, *Dismuke* v. *United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 107-108; *Hannegan* v. *Esquire*, 327 U.S. 146, 156; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337; *United States* v. *Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." 360 U.S. at 507-508.

Greene and its antecedents are particularly compelling here:

> "We are after all dealing with a subject, unemployment compensation, in which the opportunity for hearing was considered by Congress to be so fundamental that it was expressly mandated on the State agencies that they provide 'opportunity for a fair hearing, before an impartial tribunal' for all individuals whose claims are denied. See 42 U.S.C. § 503(a)(3)." *Smith, supra*, 435 F.2d at 437-438.

CONCLUSION

The judgment of the three-judge court below should be reversed, and a judgment should be entered construing 42 U.S.C. § 503(a)(1) & (3) and 5 U.S.C. §§ 8501-8508 to require an opportunity for a fair hearing for purposes of unemployment compensation for all former federal probationary employees who did not resign, or a judgment should be entered holding 5 U.S.C. § 8506(a), as interpreted by the appellees, to be unconstitutional.

Respectfully submitted,

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June 14, 1973

SUPREME COURT, U. S.
FILED
AUG 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,

Appellants,

against

NEW YORK STATE DEPARTMENT OF LABOR, Division of Employment, its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, PETER J. BRENNAN; UNITED STATES POSTAL SERVICE CORPORATION; its Postmaster General, ELMER T. KLASSEN; UNITED STATES CIVIL SERVICE COMMISSION; its Chairman ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, GEORGE P. SCHULTZ,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES NEW YORK STATE DEPARTMENT OF LABOR AND LOUIS L. LEVINE

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Statement of the Case

Appellants are both former federal employees who were discharged from their jobs during the probationary period. Both applied for unemployment insurance. Pursuant to

5 U.S.C. § 8502, appellants' unemployment insurance claims were determined by the Department of Labor of the State of New York acting as the agent of the United States (5 U.S.C. § 8502[a]).

Pursuant to 5 U.S.C. § 8502(d):

> "A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent."

The scope of consideration available to a State agency is sharply restricted by 5 U.S.C. § 8506(a) which provides that:

> "Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—
>
> (1) whether or not the Federal employee has performed Federal service;
>
> (2) the periods of Federal service;
>
> (3) the amount of Federal wages; and
>
> (4) the reasons for termination of Federal service.
>
> The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for

> correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of section 8502(d) and 8502(c) of this title. . . ."

Because appellants were probationary employees at the time they were discharged, they did not receive hearings on the reasons for separation. Any hearings by the State agency which has jurisdiction over unemployment insurance claims is limited by the provisions of 5 U.S.C. § 8506(a), *supra*. That is, while the State agency may conduct all of the proceedings which it conducts for non-federal employees, it must accept as "final and conclusive" the federal agency findings.

The gravamen of appellants' complaint is that they should have been accorded hearings on the causes of their separation and that the failure to accord such hearings violates their rights to due process and equal protection of the law and also violates the statutes governing unemployment insurance claims (42 U.S.C. § 503; 5 U.S.C. §§ 8501-8506).

ARGUMENT

Appellants' complaint against the New York State Department of Labor and its Industrial Commissioner is derivative from their complaint against the Federal appellees. The State appellees are bound by the provisions of Federal law.

Appellants do not question the adequacy of the New York procedures governing the review of claims for unemployment insurance benefits (N.Y. Labor Law, §§ 500 *et seq.*). Their claim is directed at the absence of a hearing to contest the findings of reason for discharge. To the extent that they seek to have a federal agency conduct such a hearing, the State appellees are not involved; to the extent that appellants seek to have the State appellees con-

duct such a hearing, the appellees are bound by 5 U.S.C. § 8506(a) and must accept the federal agency findings as "final and conclusive". See *Matter of Fermaglich* v. *Levine*, 41 AD2d 70 (3rd Dept., 1973).

In fact, the appellants do not argue for a State hearing of the restriction of § 8506(a). Their brief is directed at what should take place at the federal agency level before any State proceedings take place; the controversy they allege involves the procedure by which the federal agency advises the State pursuant to 5 U.S.C. §8506 of the reasons for discharge.

Accordingly, appellants have no real controversy with the State appellees who are bound to follow the federal statutory scheme with respect to former federal employees whose unemployment insurance is paid for by the federal government.

CONCLUSION

The decision below should be affirmed with respect to appellees New York State Department of Labor and Louis L. Levine.

Dated: New York, New York, August 1, 1973.

Respectfully submitted,

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL APPELLEES

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BRIEF FOR THE FEDERAL APPELLEES

OPINION BELOW

The opinion of the three-judge district court (A. 62-77) is reported at 347 F. Supp. 1158.

JURISDICTION

The judgment of the district court was entered on July 24, 1972 (A. 62, 70). Notice of appeal was filed on September 15, 1972 (A. 3, 78), and the jurisdictional statement was filed on November 14, 1972. This Court noted probable jurisdiction on April 16, 1973 (A. 80). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether either the Unemployment Compensation for Federal Employees Act, 5 U.S.C. 8501 *et seq.*, or the Due Process Clause of the Fifth Amendment requires that discharged federal probationary employees be afforded a hearing on the reasons for their removal from federal service, for the purpose of determining their eligibility for unemployment compensation.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provisions, federal statutes, and regulations are set forth in the Appendix, *infra*, pp. 31–38.

STATEMENT

Appellants are former federal probationary employees who were denied benefits under the Unemployment Compensation for Federal Employees Act, 5 U.S.C. 8501 *et seq.* They brought this class action in the district court, seeking declaratory and injunctive relief against provisions of the Act and its implementing regulations which operated to deny them a hearing on the reasons for their removal from federal service, for the purpose of determining their eligibility for unemployment compensation (A. 4–14). Appellants alleged that the Act requires such a hearing and, alternatively, that the denial of a hearing deprived them of both due process and equal protection.

1. The Unemployment Compensation for Federal Employees Act establishes a federally-financed program of unemployment compensation for civilian em-

ployees of the federal government. The states administer this program under agreements with the Secretary of Labor. See 5 U.S.C. 8502.[1] Pursuant to such an agreement, a state acts "as agent of the United States" (5 U.S.C. 8502 (a) (1)) in administering the program for federal employees whose federal service and wages were "assigned" to the state for that purpose under 5 U.S.C. 8504.

Upon the termination of a federal employee's service, he may apply to the state for unemployment compensation. Upon receiving his application, the state requests his prior employer, the federal employing agency, to submit certain information necessary to the processing of the unemployment compensation claim. This information, generally referred to as the "federal findings," includes (5 U.S.C. 8506 (a)):

> (1) the federal service the employee performed;
>
> (2) the periods of federal service;
>
> (3) the amount of federal wages; and
>
> (4) the reasons for termination of federal service.

These findings are transmitted to the state within four business days after its request. 20 C.F.R. 609.6.

The state then determines whether the applicant is entitled to compensation. 20 C.F.R. 609.19. This determination is based upon state law. 5 U.S.C. 8502(b). The federal findings with respect to reasons for termination are purely factual; they involve no conclusions of law. Whether the facts recited in those findings dis-

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[1] The Secretary of Labor directly administers the program for the Virgin Islands.

qualify an applicant for unemployment compensation is a matter of state law which the state decides.

The state must promptly notify the applicant of its determination respecting his eligibility, and in doing so it must "set forth the Federal findings in sufficient detail to enable the Federal civilian employee to determine whether he wishes to request reconsideration or correction of any such findings." 20 C.F.R. 609.20.

Upon receipt of the state determination, an applicant may request his federal employing agency to reconsider and correct the findings regarding his termination of service. 20 C.F.R. 609.23. He may obtain from that agency additional information concerning the basis of its findings (20 C.F.R. 609.22) and in support of his request for correction he may submit to the agency any written information, including affidavits and other documentary evidence, that he deems relevant. 20 C.F.R. 609.23. "The Federal agency promptly shall correct any errors or omissions in its Federal findings and shall affirm, modify, or reverse any or all of its Federal findings in writing." 20 C.F.R. 609.9. These corrected findings are promptly transmitted to the state, which must then redetermine the applicant's eligibility for compensation. 20 C.F.R. 609.24.

If, on the other hand, upon the denial of compensation the applicant has no quarrel with the correctness of the federal findings but instead believes that certain state findings, or the state's application of state law to the federal findings, were erroneous, he may request a hearing before the state. See 5 U.S.C. 8502(d) and 42 U.S.C. 503(a)(3). But the federal

findings are "final and conclusive" for purposes of this hearing. 5 U.S.C. 8506(a).

2. This case arises out of appellants' applications for unemployment compensation under the Act. Appellants had been discharged from federal service during the first-year probationary period of their employment (A. 44, 46). In accordance with established civil service procedures, they were notified of the reasons for their termination, but they received no hearing on whether their terminations were for cause (A. 44, 46, 47, 52). See 5 U.S.C. 7501, 7511; 5 C.F.R. 315.804.

Appellants applied for unemployment compensation with appellee New York State Department of Labor (the "state") (A. 44, 46), which administers the unemployment compensation program under the Act for federal employees "assigned" to New York for that purpose. The state requested appellants' federal employing agencies to submit the findings required by 5 U.S.C. 8506(a).

Those findings stated that appellant Christian had been dismissed because of an unsatisfactory attendance record (A. 44) and that appellant Green, a sky marshal for the Bureau of Customs, had been discharged for violating a rule against the consumption of alcoholic beverages within 24 hours of flight duty (see A. 46, 11). The state determined, on the basis of these findings, that both appellants had been discharged for "misconduct in connection with [their] employment" and that they were therefore ineligible for unemployment compensation under local law (A.

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27–28, 31). Labor Law, 30 McKinney's Consol. Laws of N.Y. Ann., § 593 (1965 ed.).

Appellants did not request their respective employing agencies to reconsider or correct the findings respecting the reasons for their termination of service, nor did they submit any written material designed to refute the grounds given for termination. They pursued solely state remedies in contesting the denial of unemployment compensation, and in each case the state ultimately denied compensation.

3. Appellants then brought this suit. The three-judge district court, with one judge dissenting, held that the current federal practice for making and correcting findings is consistent with the requirements of the Act and did not deprive appellants of either due process or equal protection.[2] The dissenting judge, without reaching the constitutional issues, concluded that the Act entitles federal probationary employees to a hearing on any findings which affect their rights to receive unemployment compensation.

SUMMARY OF ARGUMENT

The question in this case is whether without a hearing a federal employing agency may make findings with respect to the reason for the discharge of a federal probationary employee which are binding upon a state for purposes of determining the discharged employee's right to unemployment compensation. The federal agency does not need a hearing in order to

[2] The court also held that it lacked jurisdiction to consider the constitutional claims against the federal appellees. However, we do not challenge this Court's jurisdiction to consider those claims.

state the reasons why it discharged the employee; it needs only to consult its own records to do so. Appellants' real objective in seeking a hearing is to litigate the validity of their discharges. It is well settled, however, that probationary employees may be discharged without a hearing. Appellants cannot litigate collaterally the issue which they are barred from litigating directly.

A

The Unemployment Compensation for Federal Employees Act broadly delegates to the Secretary of Labor the responsibility for determining the procedures under which federal employing agencies are to make findings for unemployment compensation purposes. By its terms, the Act does not require that those procedures include a hearing. This omission is particularly significant in light of the facts that during consideration of the Act the attention of Congress was directed to the particular needs of probationary employees, who may be discharged without a hearing, and that when Congress has intended to require hearings for unemployment compensation purposes it has expressly so stated.

B

1. The denial of unemployment compensation to appellants did not affect any "property" interest entitled to due process protection. Appellants' interest in unemployment compensation was created together with the procedures which give it effect; that interest and those procedures must be read together as the basic rules and understandings defining the dimen-

sions of appellants' statutory entitlement to compensation. Denial of compensation in accordance with those procedures does not implicate due process protections. In any event, the procedures prescribed by the Secretary satisfy elementary standards of fairness. A discharged employee is afforded ample opportunity—an opportunity appellants ignored—to know the basis of his employing agency's proposed findings and to contest the accuracy of those findings in writing and through the submission of affidavits and other documentary evidence. Since appellants failed to take advantage of these procedures, through which they might have been able to persuade their agencies that the stated grounds for their discharge were incorrect, they cannot now complain because an evidentiary hearing was not also provided.

The existing procedures strike a reasonable balance between the need for accurate and expeditious processing of unemployment claims and the legitimate interests of the federal employing agencies. Full-blown hearing procedures would pose an unreasonable burden on those agencies and would entail unjustifiable interference with the employing agency's autonomy in dealing with probationary employees.

2. The differences in treatment between, on the one hand, discharged federal probationary employees and, on the other, private employees, permanent federal employees in the competitive service and resigning federal employees, all have a reasonable basis; appellants have not been denied equal protection.

a. Federal and non-federal employees are covered by different unemployment compensation programs

established at different times. In legislating with respect to the federal employment relationship, Congress need not establish strict comparability with general welfare provisions. Moreover, unlike an independent fact-finding tribunal such as a state unemployment compensation agency, the federal employing agency is reporting facts of which it has direct knowledge; flexible, informal investigative procedures can be effectively used in such circumstances.

b. The Secretary's regulations treat probationary and permanent employees alike. Findings are made, normally without a hearing, immediately upon the request of the state agency. However, for the completely separate purpose of the civil service tenure rules, permanent employees in the competitive service are entitled to a hearing at which they may challenge the lawfulness of their discharge. Subsequent to such a hearing, a federal employing agency may make corrections in its unemployment compensation findings. Thus the difference in hearing rights between permanent and probationary employees to which appellants object stems not from the Act but from the traditional tenure distinction between such employees, a distinction which appellants do not challenge.

c. Federal employees who resign are entitled to have their unemployment compensation findings based upon a hearing at which they personally appear. A departure from the normal internal procedures for determining the reasons for termination of service is necessary in the cases of such employees, for only they can explain the reasons for their own resignations.

ARGUMENT

NEITHER THE ACT NOR THE DUE PROCESS CLAUSE REQUIRES THAT DISCHARGED FEDERAL EMPLOYEES BE GRANTED A HEARING ON THE REASONS FOR THEIR REMOVAL FROM FEDERAL SERVICE FOR THE PURPOSE OF DETERMINING THEIR ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION

A. INTRODUCTION

Under settled principles discussed below (*infra*, p. 27), the federal government may discharge probationary employees during their probationary period without a hearing. Appellants do not directly challenge this authority. Although apparently recognizing that their discharge without a hearing was proper, they contend that they were entitled to a hearing before the federal government could make findings, binding upon the state for purposes of determining their eligibility for unemployment compensation, with respect to the reason for their discharge.

The determination of the reason for the discharge of a probationary employee involves no factual issue requiring a hearing. The federal agency knows the reasons for its action, and in order to state them it need only consult its own records. Appellants' real contention is not that the federal agencies incorrectly stated the reasons which led the agencies to discharge appellants, but that such discharges were improper.

In other words, appellants are seeking to use the procedure for determining their right to unemployment benefits as a means for collaterally attacking the termination of their probationary employment. Appellant Christian, for example, is obviously not contending that the actual basis for her discharge was

not, as the agency stated, her unsatisfactory attendance record. Her argument, rather, is that in fact her attendance was not unsatisfactory, and that her discharge therefore was improper. Appellants are thus seeking a hearing to litigate indirectly an issue which, as probationary employees, they could not directly litigate, namely, the validity of their discharges.

Although appellants purportedly are not challenging the validity of their discharges, that is the necessary effect of the remedy they seek. Suppose, for example, that the federal agencies were required to hold hearings before they could make findings, binding on the state for purposes of determining appellant's right to unemployment compensation, with respect to the reasons for appellants' discharges. Suppose, further, that after such hearings the federal agencies found that appellant Christian did not have an unsatisfactory attendance record and that appellant Green had not consumed alcoholic beverages within 24 hours of flight duty.

Those findings would result in appellants being entitled to unemployment benefits under state law. But such findings also would show that appellants' probationary employment had been improperly terminated. It would be difficult or impossible for the federal agency thereafter to refuse to restore appellants to the employment from which, it had held, they had been improperly discharged. Thus, the consequence of permitting probationary employees to litigate the reasons for their discharge, ostensibly merely to determine their eligibility for unemployment bene-

fits, would be to overturn the settled principle that a probationary employee does not have the right to contest the propriety of his discharge.

It is in the light of these considerations that appellants' statutory and constitutional arguments must be evaluated.

B. THE ACT DOES NOT REQUIRE A HEARING

The district court correctly determined that, as a matter of statutory construction, the federal appellees had no duty to provide a hearing on the reasons for appellants' discharges. The pertinent statutory provision, 5 U.S.C. 8506(a), provides only that the federal employing agency shall make "findings" concerning, *inter alia*, "the reasons for termination of Federal service," that such findings are to be made "in the form and manner prescribed by regulations of the Secretary [of Labor]," that those "regulations shall include provision for correction by the employing agency of errors and omissions," that the findings are to be transmitted to the appropriate state agency, and that they are to be "final and conclusive." In delegating to the Secretary the responsibility for determining the manner in which the employing agency's findings are to be made, Congress did not require a hearing.

The only stated limitation on the Secretary's discretion to select appropriate fact-finding procedures is the requirement that there be provision for correction of errors. This is not a hearing requirement. The omission of a hearing requirement is significant, for when Congress has intended to require hearings for unem-

ployment compensation purposes, it has expressly so provided. See 5 U.S.C. 8503(c); 42 U.S.C. 503(a)(3).[3] Accordingly, the natural reading of 5 U.S.C. 8506, as even the dissenting judge below conceded (A. 75), is that the Secretary has been granted authority to select the fact-finding process—either including or excluding an adversary hearing—which in his view would best accord with the interests of claimants in expeditious but fair processing and of the federal employing agencies in administrative flexibility and some autonomy in employment matters.

Congress knew that not all federal employees were given a hearing prior to discharge, and the legislative history shows that it did not intend to superimpose new procedural requirements over normal discharge procedures. In considering the Act, Congress was concerned with the status of probationary employees, who were particularly susceptible to discharge and therefore peculiarly in need of unemployment protection. The Chairman of the Civil Service Commission testified (Hearings on Unemployment Insurance, H.R. 6537, 6539, 7054, 8857 and 8585 before the House Committee on Ways and Means, 83d Cong., 2d Sess., at 116):

[3] Those provisions require the agency administering the unemployment insurance program to provide a "fair hearing." 5 U.S.C. 8503(c) applies in those instances when the unemployment compensation program is being administered by the Secretary. 42 U.S.C. 503(a)(3) applies, by virtue of 5 U.S.C. 8502(d), in cases where the program is administered by a state agency. However, the findings made by the federal employing agency under 5 U.S.C. 8506 are "final and conclusive" for purposes of the statutory "fair hearing." See pp. 4–5, *supra*. Thus it was intended that the findings of the employing agency are to be made prior to and independently of that "fair hearing."

> There are now more than 600,000 indefinite and temporary Federal workers. Turnover is particularly heavy in this group of employees who are most vulnerable in reductions of force * * *. They * * * have no retirement contributions to withdraw, and generally can save little or no leave to tide them over unemployment.[4]

The problems of temporary or probationary employees were also discussed during floor debate in the House. 100 Cong. Rec. 10065 (Congressman Reed), 10079 (Congressman Springer). At the same time, Congress presumably was aware of its own legislation, 5 U.S.C. 7501 and 7511, permitting probationary employees, and other federal employees not in the competitive service, to be discharged without cause and specifically providing that, even in cases of discharge for cause, "[e]xamination of witnesses, trial, or hearing is not required." 5 U.S.C. 7501(b). The long-standing administrative practice under Civil Service Commission regulations, of which Congress also must have been aware, had been to discharge probationary employees without a hearing. 5 C.F.R. 315.804.

Thus in delegating authority to the Secretary to prescribe the fact-finding procedures to be employed under the Act, Congress was aware both of the job insecurity of probationary employees and of the sum-

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[4] The Commissioner referred to the fact that Congress in 1950 had amended the Social Security Act (64 Stat. 495) to extend old-age and survivors insurance benefits specifically to probationary federal employees, who were not subject to the civil-service retirement program applicable to tenured federal employees. See H. Rep. No. 2771, 81st Cong., 2d Sess., 21–22, 96; S. Rep. No. 1669, 81st Cong., 2d Sess., 16, 86, 88, 219–220; H. Rep. No. 1300, 81st Cong., 1st Sess., 128–129.

mary discharge procedures to which they are subject. Yet in providing greater economic security for such employees, Congress indicated no intention of changing or adding to normal discharge procedures. To the contrary, it was understood that administration of the Act would not significantly affect "existing operating methods and procedures." Hearings, *supra*, at 55. In these circumstances it is unlikely that Congress would have imposed the additional requirement of a hearing without specifically considering the matter and then making its will explicit. There is nothing in the legislative history, however, even suggesting the intention to require a hearing.

In contending that the Act requires hearings with respect to the reasons for termination of federal service, appellants cannot rely upon either its text or its legislative history. Their statutory claim is little more than that Congress should have required hearings as a matter of good policy and that this Court should indulge in what the district court characterized as "a tortured, strained and unnecessary interpretation" (A. 67) to accomplish a result which the Congress rejected. But policy determinations of that kind, unless of constitutional dimension (see pp. 17–28, *infra*), are matters for the Congress.

The true nature of appellants' argument is shown by their resort to broad generalizations concerning presumed legislative intent. These generalizations—about providing "sustenance and temporary security to unemployed workers" (Br. 42–43), "maximizing the opportunity to look for work" (Br. 44), and "providing to all covered federal employees the same fa-

vorable conditions of employment as are provided to other covered employees" (Br. 50)—shed little light on the narrow question of statutory interpretation involved here. But underlying appellants' generalizations is the implication that the administrative determination of why an employee has been fired is somehow inherently suspect or unfair unless based on an adversary hearing, and that Congress therefore may not be presumed to have contemplated non-hearing procedures in a remedial statute. As noted above, however, (p. 10, *supra*), the administrative determination can be simply and objectively made on the basis of the agency's own records.

Appellants' analysis of the statutory text is similarly unfruitful. They suggest, first, that the word "findings" necessarily implies that the findings be made after a hearing. Although, as they state (Br. 54), that word frequently "denote[s] determinations made after a hearing," factual determinations embodied in findings are also frequently reached without a hearing. "Findings" merely describes the end result of a fact-finding procedure; it is neutral as to the particular kind of fact-finding process employed. See K. Davis, *Administrative Law Text,* pp. 331–341 (3d ed. 1972). It is a word that must be read in context, and the context here is one of broad discretion in the Secretary to specify the fact-finding procedure. Cf. *Eastern Airlines* v. *Civil Aeronautics Board,* 185 F. 2d 426, 428 (C.A.D.C.).

Appellants further contend that Congress could not have intended administrative findings not based upon a hearing to be "final and conclusive." But the nature

of what the agency "finds"—the findings are merely a statement of the agency's reasons for discharging the employee—would make it inappropriate for the state to re-examine the determination. Another reason the findings were made "final" was because "these findings involve questions of Federal employment and wages which require uniform application at the Federal level, rather than interpretation by 51 non-Federal jurisdictions." Hearings, *supra*, at 16, 55.

Finally, appellants contend that a hearing requirement should be read into 5 U.S.C. 8506 in order to avoid constitutional questions. But such a reading of the statute would involve such "attenuated subtleties" (*Lucas* v. *Earl*, 281 U.S. 111, 114) that it should be resorted to only if giving effect to its stated language would make it unconstitutional. As we now show, the absence of a hearing does not invalidate the statute.

C. THE LACK OF A HEARING DOES NOT DENY DISCHARGED PROBATIONARY EMPLOYEES DUE PROCESS OR EQUAL PROTECTION

1. *Due process does not require a hearing.* Appellants contend (Br. 18–29) that the lack of a hearing respecting the reasons for their discharge denied them procedural due process. But a full trial-type hearing is not constitutionally required in all cases where government action affects individual interests. This Court's recent decisions make it clear that the due process clause is applicable only if an individual interest in "property" or "liberty" is at stake. *Board of Regents* v. *Roth*, 408 U.S. 564, 571–572, 577; *Perry* v. *Sindermann*, 408 U.S. 593, 599, 601–602; *Fuentes* v. *Shevin*, 407 U.S. 67, 90, n. 21.

Appellants make no claim that their removal from federal service or the subsequent denial of unemployment compensation affected their protected "liberty" interests.[5] Appellants' removal from federal service implicated no "property" interests entitled to due process protection, since federal probationary employees have no "legitimate claim of entitlement" (*Roth, supra,* 408 U.S. at 577) to continued government employment. See, *e.g., Jenkins* v. *United States Post Office,* 475 F. 2d 1256, 1257 (C.A. 9), petition for a writ of certiorari pending, No. 72–1665; *Sayah* v. *United States,* 355 F. Supp. 1008, 1015–1016 (C.D. Cal.). Cf. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886. Appellants' argument is, rather, that they have a statutory right to unemployment compensation benefits, and that this "property" interest entitles them, as a matter of constitutional due process, to a hearing on the reasons for termination of their federal service.

This argument, however, is in reality an attack upon either the summary termination of appellants' probationary employment or upon the congressional determination to permit the states to apply state standards in denying unemployment compensation to certain categories of employees—here, those discharged for misconduct. The former authority, as we

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[5] Removal from federal service may affect an employee's "liberty" only when it is accompanied by charges which "seriously damage his standing and associations in his community * * * or impose * * * a stigma or other disability [foreclosing him from] other employment opportunities." *Board of Regents* v. *Roth, supra,* 408 U.S. at 573.

have shown, is well settled. The answer to the latter claim is that if Congress may permit probationary employees to be summarily discharged—and we repeat that appellants do not contend otherwise—it also may permit the states to apply their own standards governing eligibility for unemployment compensation.

A state certainly may deny unemployment benefits to someone whose unemployment is the result of his own misconduct. Appellants may litigate in the state proceeding the question whether the ground upon which their federal employment was terminated constitutes misconduct under state law. But due process does not require that they be permitted indirectly to litigate the validity of that termination. The claim cannot be magnified into one of constitutional dimension by framing it in terms of a right to unemployment benefits that cannot be cut off without a hearing.

Moreover, the scope of any constitutionally protected property interest that appellants may have in unemployment benefits depends upon the "rules and understandings" which establish, define, and circumscribe it. See *Perry* v. *Sindermann, supra,* 408 U.S. at 602. The substantive right to unemployment compensation conferred by the Unemployment Compensation Act is integrally related to and defined by the procedural limitations Congress imposed on that right, including the procedures for making the findings related to federal employment. Denial of unemployment compensation in accordance with those procedures did not deny appellants any constitutionally protected rights, since such denial merely reflected the limita-

tion on the right to unemployment compensation that the statute creating the right itself imposes.[6]

This Court has long recognized these principles, and the limitation they place on the requirements of due process, in cases involving the creation by the government of claims against itself. See *Dismuke* v. *United States*, 297 U.S. 167. This is such a case: the unemployment compensation appellants seek is a claim against the federal fisc which arises by virtue of the prior employment relationship between the claimant and the federal government.[7] Congress could have made appellants' administrative remedy exclusive, with no right to judicial review. *Dismuke* v. *United*

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[6] This is not a case like *Goldberg* v. *Kelly*, 397 U.S. 254, where continuing receipt of a benefit was being terminated. *Goldberg* turned upon the inadequacy of a post-termination fact-finding process since "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S. at 264 (emphasis in the original). Appellants here did not have benefits terminated and we do not understand them to complain of the delay incident to the beginning of benefits caused by New York's procedures. Any such complaint, resting upon an extension of *Goldberg's* rationale, would be directed at state rather than federal law. New York law postpones the receipt of unemployment benefits pending administrative redetermination of the applicant's eligibility. It could just as well, so far as the federal statute is concerned, provide for the payment of benefits subject to termination after a state hearing upon whether the facts found by the federal employing agency constituted "misconduct in connection with his employment" under state law. In short, we think no *Goldberg* problem exists here, and, if one does, it is created by state rather than federal procedures.

[7] Although the State administers the unemployment compensation program, it does so as the agent of the federal government, which pays the costs of the program. 5 U.S.C. 8502.

States, supra, 297 U.S. at 171–172. Congress stopped short of making the administrative remedy wholly exclusive here, but it did vest in the federal employing agency sole authority to make certain findings in accordance with procedures to be prescribed by the Secretary, which findings themselves are final and conclusive.

Appellants fare no better even if one assumes, *arguendo,* that due process protections are implicated by the deprivation of an interest in accordance with procedures established along with that interest. In such circumstances due process requires only procedures "which satisf[y] elementary standards of fairness or reasonableness essential to the due conduct of the proceeding which Congress had authorized." *Dismuke* v. *United States, supra,* 297 U.S. at 172. The Secretary's regulations satisfy those standards and provide discharged probationary employees with reasoned consideration of the facts relevant to their unemployment compensation claims.

As explained above (*supra,* pp. 4, 12), the Secretary's regulations governing unemployment compensation satisfy the statutory requirement that they provide "for correction by the employing agency of errors and omissions." 5 U.S.C. 8506(a). A discharged probationary federal employee is informed of "the basis for [the] Federal finding[s]," and he may obtain "more specific information" from the employing agency if he believes the initial findings are unclear or incomplete. 20 C.F.R. 609.22 and 609.8. A discharged employee may request his agency to reconsider and correct its findings, and he may submit any

information he deems relevant to the determination of the reasons for his removal. 20 C.F.R. 609.23(a), 609.9 and 609.7.

Although these informal procedures do not constitute a trial-type hearing, they do give discharged employees ample opportunity to know the basis for the employing agency's determinations, to present their contentions concerning the reasons for their dismissal, and to contest the accuracy of proposed findings. Those procedures, amounting to a hearing on a paper record, adequately protect the discharged employee's interest in receipt of unemployment compensation. Cf. *Torres* v. *New York State Department of Labor,* 321 F. Supp. 432 (S.D.N.Y.), vacated, 402 U.S. 968, adhered to, 333 F. Supp. 341, affirmed, 405 U.S. 949.

These procedures provide a reasonable balance between the employee's interest in a prompt and correct determination of the reasons for his discharge and the employing agency's interest in retaining flexibility and a certain degree of autonomy in dealing with employees. The Secretary's regulations facilitate expeditious handling of the employee's unemployment compensation claim by requiring that the employing agency make its findings and transmit them to the state immediately—within four business days of the state's request. 20 C.F.R. 609.6. The receipt of unemployment compensation benefits would be substantially delayed if a federal hearing were required prior to the making and transmittal of findings. Such delay would undermine the principal purpose of the Act: to provide a period of economic security during which an unemployed individual may seek new employment

without the immediate threat of pressing need. In addition, requiring the kind of evidentiary hearing appellants are seeking from the federal government would impose a serious administrative burden upon the latter.

Since appellants did not utilize existing administrative procedures in an attempt to change the federal findings with respect to the reasons for their discharge, they cannot now complain that those procedures would have been inadequate. If appellants had evidence to show that Christian's attendance record was satisfactory and that Green had not consumed alcoholic beverages within 24 hours of flight duty, they should have submitted it to their employing agencies. Had they done so, the agencies might have changed their findings to show that appellants' discharges were for reasons that did not constitute misconduct under New York law, and appellants then would have obtained unemployment benefits. Having failed to exhaust those procedures, however, appellants cannot now complain because they did not also have available the right to an evidentiary hearing.

2. *The lack of a hearing does not deny discharged federal probationary employees equal protection.* Appellants stress that unemployment compensation claimants discharged from non-federal service are granted a "fair hearing" on all issues relating to their entitlement to benefits (42 U.S.C. 503(a)(3)), that non-probationary federal employees in the competitive service may obtain a hearing to determine whether their discharge was for cause (*e.g.*, 5 C.F.R. 752.202), and that under the Secretary's regulations unemploy-

ment compensation claimants resigning from federal service are granted a hearing to determine the reasons for their termination from service (20 C.F.R. 609.18). They claim (Br. 30–40) that in these circumstances the absence of any hearing on the reasons for the termination of their federal service constitutes a denial of equal protection of the law. But the different classifications to which appellants point all have a reasonable basis and are therefore valid. *Jefferson* v. *Hackney,* 406 U.S. 535; *Richardson* v. *Belcher,* 404 U.S. 78; *Dandridge* v. *Williams,* 397 U.S. 471.

a. Federal and non-federal employees are covered by different unemployment compensation programs established at different times. The programs for non-federal employees are established under state law and administered entirely by the states. Since 1935, the costs of administering those programs have been financed by federal taxes on private employers, but the compensation payments themselves are funded by the states. See 42 U.S.C. 502(a) and 1101(c). The program for federal employees was established under federal law in 1954 and is administered by the states as agents of the United States under agreements with the Secretary of Labor.

Equal protection does not require these separate programs to employ identical fact-finding procedures. There is no reason why a federal employing agency, in reporting the reasons why an employee was discharged, must employ the same adjudicative procedures as an independent fact-finding tribunal, such as a state unemployment compensation agency. The federal employing agency is reporting facts known to its

officials or with which they have at least some acquaintance; flexible, informal investigative procedures may be more expeditious and just as accurate in such circumstances. Such findings were made final and conclusive on the state in order to avoid having a state agency review a federal agency's factual findings that affect only federal benefits.[8]

b. Appellants contend that only probationary federal employees are denied a hearing, for unemployment compensation purposes, with respect to the reasons for the termination of their federal service. This contention is factually incorrect, and involves a basic misunderstanding of the Secretary's regulations. Those regulations treat all federal employees, whether permanent or probationary, in the same manner. No hearing is required with respect to either group (20 C.F.R. 609.6) and the procedures for the correction of errors are also identical (20 C.F.R. 609.7–609.9, 609.20, 609.22–609.24). The intention of the Secretary was to avoid disturbing normal employee discharge procedures.

Two broad classes of federal employees may be discharged without a hearing. Employees, such as most lawyers, in positions excepted from the competitive service may be removed at the will of the appointing

[8] A comparable "finality" provision, governing findings as to the reason for discharge from the armed service, is part of the state-administered, federally-financed unemployment compensation program of the Ex-Servicemen's Act of 1958. See 5 U.S.C. 8523; 20 C.F.R. 614.8. This provision, like the "final and conclusive" provision in 5 U.S.C. 8506(a), reflects the legitimate federal interest in avoiding the friction entailed by state agency review of a federal agency's factual findings that affect only federal benefits.

officer. 5 C.F.R. 6.4; 5 C.F.R. 752.103(a). Probationary employees in the competitive service, such as appellants, may also be removed without a hearing. 5 C.F.R. 315.804; see also 5 C.F.R. 772.305(a). Discharged permanent employees, however, are entitled to a subsequent hearing on the propriety of their discharge. 5 C.F.R., Part 772; see, also, 5 C.F.R. 752.202. It is this distinction which is the real basis for appellants' claim that they have been uniquely denied a hearing.

The discharge hearing provided to permanent employees in the competitive service has little direct relationship to the making of findings under the Secretary's regulations. Those findings must be made immediately upon the discharged employee's request for unemployment compensation. 20 C.F.R. 609.6. This will normally be long before the completion of hearings, if any, conducted to determine whether the discharge was itself lawful. Thus the initial findings with respect to the discharged permanent employee in the competitive service, like those with respect to probationary employees and employees in excepted positions, will not be based upon a hearing. After that, the same provisions with respect to corrections of errors apply to all employees.

The fact that in some cases corrections of findings with respect to permanent employees may be made by the agency on its own initiative, on the basis of information developed in a hearing conducted later with respect to the different issue of the lawfulness of the discharge, does not create an invidious distinction. This distinction merely follows from the long-standing tenure distinction, established in the 1883 Civil Service

Act, 22 Stat. 404, between probationary and permanent employees.

Appellants do not challenge this basic tenure distinction or the propriety of summary discharges of federal probationary employees. It is well settled that such employees may constitutionally be discharged without a hearing. See, *e.g.*, *Jenkins* v. *United States Post Office*, 475 F. 2d 1256 (C.A. 9), petition for writ of certiorari pending, No. 72–1665; *Jaeger* v. *Freeman*, 410 F. 2d 528 (C.A. 5); *Levy* v. *Woods*, 171 F. 2d 145 (C.A.D.C.). This rule is rooted in the practicalities of administration. The first year of federal employment, the one-year probationary period, is a trial period during which the employee's qualifications may be judged. Civil Service tenure traditionally, and with good reason, has been earned only through the satisfactory completion of an extended period of service during which the employing agency has a fair opportunity to evaluate job performance. That evaluation historically has been left to the discretion of the employing agency.

Thus, the distinction between the hearing rights of permanent and probationary employees is reasonably grounded in the comparative effects such hearings have on the government's historic relationship with its employees. Permanent employees by definition have tenure; they may directly challenge the lawfulness of their discharge; and any information resulting from that challenge can, without otherwise disturbing the established relationship between the government and such employees, be used by an employing agency in correcting findings it has made for unemployment

compensation purposes. In contrast, probationary employees have no right to challenge the validity of their discharge and therefore should not be permitted to contest it, either directly or collaterally, in extended adjudicative proceedings which would interfere with the government's traditional right of summary discharge. Hearings held to challenge the federal findings under 5 U.S.C. 8506 would result in precisely such interference.

c. Following the decision in *Smith* v. *District Unemployment Compensation Board,* 435 F. 2d 433 (C.A. D.C.), the Secretary amended his regulations to provide that the federal employing agency's findings of the reasons for an employee's resignation must be made after a hearing. 20 C.F.R. 609.18. This distinction between discharges and resignations has a sound basis.

When an employing agency discharges an employee, it has acted affirmatively and knows the reasons for its own action. But when an employee resigns, the agency ordinarily will have no information concerning his reasons. Thus the normal internal procedures for determining the reasons for termination of service are by their very nature inadequate in cases of resignation. More elaborate procedures, at which the employee himself is present, are necessary to provide the agency with sufficient information to make findings. Thus reasons exist for holding a hearing with respect to resignations which do not pertain in cases of discharges.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1973.

APPENDIX

1. Amendment V to the Constitution of the United States, in pertinent part, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

2. The Unemployment Compensation for Federal Employees Act, 5 U.S.C. 8501 *et seq.*, provides, in relevant part:

> § 8502. *Compensation under State agreement*
>
> (a) The Secretary of Labor, on behalf of the United States, may enter into an agreement with a State, or with an agency administering the unemployment compensation law of a State, under which the State agency shall—
>
> (1) pay, as agent of the United States, compensation under this subchapter to Federal employees; and
>
> (2) otherwise cooperate with the Secretary and with other State agencies in paying compensation under this subchapter.
>
> * * * * *
>
> (d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.
>
> * * * * * *
>
> § 8506. *Dissemination of information*
>
> (a) Each agency of the United States and each wholly or partially owned instrumentality

of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

(1) whether or not the Federal employee has performed Federal service;

(2) the periods of Federal service;

(3) the amount of Federal wages; and

(4) the reasons for termination of Federal service.

The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c) of this title. This subsection does not apply with respect to Federal service and Federal wages covered by subchapter II of this chapter.

* * * * *

§ 8508. *Regulations*

The Secretary of Labor may prescribe rules and regulations necessary to carry out this subchapter and subchapter II of this chapter. The Secretary, insofar as practicable, shall consult with representatives of the State unemployment compensation agencies before prescribing rules or regulations which may affect the performance by the State agencies of functions under agreements under this subchapter.

The Social Security Act of 1935, as amended, 42 U.S.C. 301, *et seq.*, provides, in pertinent part:

> § 503. *State laws, provisions required; stopping payments on failure to comply with law.*
>
> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
>
> * * * * *
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; * * *
>
> * * * * *

3. Pertinent regulations of the Secretary of Labor, 20 C.F.R. 609.5, *et seq.*, provide as follows:

> § 609.5 Information to Federal civilian employees.
>
> Each Federal agency shall—
>
> (a) furnish information to its employees explaining their rights and responsibilities under the UCFE program and 18 U.S.C. 1919; and
>
> (b) complete Standard Form 8, "Notice to Federal Employee About Unemployment Compensation," in accordance with instructions thereon, and furnish a completed copy of such form to each employee at the time of separation from Federal civilian service, when transferred from one payroll office to another, or when the office responsible for distribution of the form is advised that an individual is on nonpay status for 7 consecutive days or more.
>
> § 609.7 Corrected Federal findings.
>
> If a Federal agency ascertains at any time within 1 year after it has returned a completed Form ES–981 to a State agency or the Secretary that any of its Federal findings were erroneous it shall promptly correct its error and

forward corrected Federal findings to the State agency or the Secretary, as appropriate.

§ 609.8 Answering requests for additional information.

On receipt of a request for additional information under § 609.22 a Federal agency except where it would be inconsistent with general policies followed in the case of separations for security reasons shall furnish in writing to the requesting authority such additional information as (1) will enable a Federal civilian employee to understand the basis for Federal findings or (2) will enable the requesting authority to correctly apply a State unemployment compensation law.

§ 609.9 Answering requests for correction of Federal findings.

On receipt of a request for reconsideration and correction of Federal findings under § 609.23 a Federal agency shall consider the information supplied in connection with such request and shall review its Federal findings. The Federal agency promptly shall correct any errors or omissions in its Federal findings and shall affirm, modify, or reverse any or all of its Federal findings in writing. The Federal agency then shall forward its reconsidered Federal findings to the requesting authority.

§ 609.10 Additional information to State agencies or Secretary.

In addition to the information required by §§ 609.6, 609.8, and 609.9 a Federal agency shall furnish to a State agency or the Secretary, as appropriate, any information which it is not otherwise prohibited from releasing by law which may be necessary for the administration of the UCFE program.

§ 609.18 Finality of Federal findings.

(a) Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Fed-

eral findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23.

(b) Additional information submitted by a Federal agency under § 609.8 shall be considered part of the original Federal findings which, as so supplemented, shall be final and conclusive, as provided in paragraph (a) of this section.

(c) Federal findings which after reconsideration under § 609.9 have been affirmed, modified, or reversed by the Federal agency shall be final and conclusive, as provided in paragraph (a) of this section.

§ 609.20 Notice of determination.

A notice of determination or redetermination shall be given to a Federal civilian employee with respect to any determination or redetermination under § 609.19 or § 609.31. Such notice shall be given in the same manner as notice of determination or redetermination is given to claimants under the State unemployment compensation law. The notice shall include the Federal findings and shall inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings. The State agency shall set forth the Federal findings in sufficient detail to enable the Federal civilian employee to determine whether he wishes to request reconsideration or correction of any such findings.

§ 609.22 Procedure for obtaining additional information.

(a) ***Request by Federal civilian employee.*** If a Federal civilian employee needs additional information in order to understand the basis for a Federal finding in connection with a claim for compensation under the UCFE program he may file a request through the State agency, or the Secretary if the State agency does not determine claims under the UCFE program, for more specific information from the Federal agency which made such Federal finding. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for additional information is filed, such employee must file concurrently with such request a timely appeal or request for redetermination under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency the additional information requested.

(b) ***Request by State agency.*** If at any stage of determining a Federal civilian employee's entitlement to compensation a State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary determines that Federal findings do not contain sufficient information to enable correct application of the State unemployment compensation law a request may be made for additional facts from the appropriate Federal agency.

§ 609.23 Procedure for obtaining correction of Federal findings.

(a) ***Request by Federal civilian employee.*** A Federal civilian employee who wishes a Federal agency to reconsider and correct Federal findings in connection with a claim for compensation under the UCFE program may file a

request for such reconsideration and correction, together with such information as supports his request, through the State agency before which the claim is pending or through the Secretary if the State agency does not determine claims under the UCFE program. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for reconsideration and correction of Federal findings is filed, such employee must file concurrently with such request a timely appeal under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency its reconsidered Federal findings.

(b) *Request by State agency.* A State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary may request a Federal agency to reconsider and correct its Federal findings at any stage in determining a Federal civilian employee's entitlement to compensation.

§ 609.24 Procedure after correction of Federal findings.

(a) A State agency shall forward to the affected Federal civilian employee a copy of reconsidered Federal findings or additional information furnished by a Federal agency.

(b) If additional information or reconsidered Federal findings provide a basis under the State unemployment compensation law for the State agency to redetermine such employee's entitlement to compensation the State agency promptly shall make a redetermination and give notice thereof to the affected Federal civilian employee.

(c) If a State agency after reviewing additional information or reconsidered Federal

findings submitted by a Federal agency does not consider that there is a basis for making a redetermination the State agency promptly shall set a date for hearing the Federal civilian employee's appeal.

(d) If Federal findings are corrected under § 609.7 a State agency shall notify the affected Federal civilian employee of such correction. If the State unemployment compensation law permits and the corrected Federal findings afford a basis for such action the State agency shall redetermine such employee's entitlement to compensation and give notice of redetermination to such employee.

§ 609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under § 609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

(b) A determination or redetermination as to entitlement to compensation by the Virgin Islands agency is, subject to the same exception with respect to Federal findings, as in paragraph (a) of this section, to be reviewed as provided in §§ 609.34 and 609.46.

§ 609.26 Disclosure of information.

Information received by a State agency in administering the UCFE program is confidential, and disclosure thereof is authorized, to the same extent as information received by such State agency in administering its State unemployment compensation law, or in the case of the Virgin Islands agency to the same extent as information received under the Virgin Islands unemployment compensation law.

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U. S.
FILED
OCT 25 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,
Appellants,

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN THE

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No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,

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NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

ARGUMENT

I.

INTRODUCTION

Appellants have been denied their right to unemployment compensation, without a fair hearing at any time, solely on the basis of their former employers' *ex parte* reasons for termination. By the instant case, the appellants seek only to have the most frequently disputed issue in unemployment compensation (the reasons for termination of employment) impartially determined, and

hence to have their eligibility for compensation impartially determined, in a fair hearing provided either by the federal appellees or by the state appellees.

In their Brief, the federal appellees[1] erroneously characterize the purposes of and circumstances relevant to this action. Once these mischaracterizations are dispelled, the insubstantiality of the appellees' arguments becomes apparent.[2]

A. Appellants Seek Only Unemployment Compensation, Not Reemployment

The appellees allege that the "Appellants' real contention is not that the federal agencies incorrectly stated the reasons which led the agencies to discharge appellants, but that such discharges were improper" [Br. 10], and that the appellants "have no right to

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[1] The state appellees do not take issue with the appellants' claims; they contend only that they are bound by the federal appellees' interpretation of 5 U.S.C. §8506(a), and hence they defer to the federal appellees. Accordingly, this Reply Brief for Appellants is directed at the arguments advanced by the federal appellees. For convenience, the federal appellees will hereafter be referred to as the "appellees." References to the Brief for the Federal Appellees will be cited as "Br.___."

[2] Not included in this discussion is the correction of two factual errors made in the appellees' Brief. The first error is the appellees' statement that both appellants, on the basis of the *ex parte* reasons submitted by the federal appellees, were disqualified from receiving unemployment compensation on grounds of their "misconduct." [Br. 5-6, 19, 23]. The record, however, shows that only appellant Green was disqualified for misconduct. [A. 31]. Appellant Christian, on the other hand, was disqualified for voluntarily leaving her employment without good cause by reason of provoked discharge. [A. 15-16, 19-28, 44-51]. The second error is discussed in note 10, and accompanying text, pp. 10-11, *infra*.

challenge the validity of their discharge and therefore should not be permitted to contest it, either directly or collaterally." [Br. 28].

The appellants, however, never have contended that their discharges were improper nor have they sought to contest the validity of their discharges. [A. 12-14, 40-41]. As stated by Judge Frankel in his Dissenting Opinion below, "nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation." [A. 76, n.7] [emphasis in original]. The appellees subsequently contradict themselves by conceding that, "Appellants do not challenge . . . the propriety of summary discharges of federal probationary employees." [Br. 27]. Indeed, all the appellants seek is the right to a fair hearing for purposes of unemployment compensation—not for employment or reemployment.

B. A Fair Hearing for Unemployment Compensation Would Not Affect Federal Discharge Procedures

In their argument against the requirement for a fair hearing for making impartial findings, the appellees state that "[t]hose findings would result in appellants being entitled to unemployment benefits under state law. But such findings also would show that appellants' probationary employment had been improperly terminated. It would be difficult or impossible for the federal agency thereafter to refuse to restore appellants to the employment from which, it had held, they had been improperly discharged." [Br. 11]. In the same vein, the appellees contend that an unemployment compensation

fair hearing "would interfere with the government's traditional right of summary discharge." [Br. 28].

The fallacy of the appellees' contention is that the federal civil service system does not recognize the concept of improper termination of probationary employees.[3] As conceded by the appellees, probationary employees are "particularly susceptible to discharge" because they may be "discharged without cause." [Br. 13, 14]. See 5 U.S.C. §7501, 5 C.F.R. §315.804. Since probationary employees may be properly discharged without cause, an unemployment compensation hearing which merely reviews the facts surrounding a discharge without cause cannot affect the discharge nor can it cause reemployment.

C. A Fair Hearing Is Necessary To Determine the Most Frequently Disputed Issue in Unemployment Compensation

Although the appellees concede that the "reasons for termination are purely factual" [Br. 3], they incongruously contend that "[t]he determination of the reason for the discharge of a probationary employee involves no factual issue requiring a hearing. The federal agency knows the reasons for its action, and in order to state them it need only consult its own records." [Br. 10]. By this contention, the appellees provide support for the appellants' argument that such hasty, *ex parte* actions are precisely the type of actions which unemployment compensation hearings prevent. Moreover, the appellees conveniently overlook the fact that

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[3] The only exception to this is where a probationary employee has been discharged by reason of illegal discrimination or improper procedure. 5 C.F.R. §315.806.

the reasons for termination of employment constitute the "most frequently disputed" factual issue in unemployment compensation. *California Department of Human Resources v. Java*, 402 U.S. 121, 126 (1971).[4] Indeed, the appellees' contention that there is no factual issue requiring an unemployment compensation hearing is plainly rebutted by the state appellees' *finding* that Ms. Christian's separation was not the result of unsatisfactory conduct—a factual finding contrary to the *ex parte* reasons submitted to the state appellees by the federal appellees. [A. 21-22, 45].

D. The Required Fair Hearings May Be Provided Either by the Federal Appellees or by the State Appellees

The appellees repeatedly characterize the appellants' argument as one requiring the federal appellees to provide a fair hearing. The appellants, however, do not contend that the hearing required for purposes of unemployment compensation must be provided by the federal appellees. Rather, the appellants contend, as a unanimous panel of the Court of Appeals for the District of Columbia in

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[4] In New York, as in California, the reasons for termination of employment constitute the most frequently disputed issue in unemployment compensation. For example, in March, 1972, there were 4010 appeals taken to hearing referees from initial determinations of ineligibility or eligibility for compensation. Of these appeals, 2506, or 62.4% concerned reasons for termination of employment (misconduct in employment or voluntarily leaving without good cause). New York State Department of Labor, *Operations*, Vol. 34, No. 3, Table 17-A (March 1972). Similarly, in May, 1972, there were 3467 appeals to hearing referees. Of these appeals, 2471, or 62.2% involved reasons for termination of employment. New York State Department of Labor, *Operations*, Vol 34, No. 5, Table 17-A (May 1972).

Smith v. District Unemployment Compensation Board, 435 F.2d 433 (D.C. Cir. 1970) held, only that a hearing for purposes of unemployment compensation must be provided. Particularly instructive here is the remedy ordered by the Court of Appeals in *Smith* requiring that a hearing be provided either by the federal agencies *or* by the unemployment compensation agency. 435 F.2d 433, 439. Since the federal agencies in *Smith* subsequently declined to provide the fair hearing, the District Court ordered the unemployment compensation agency to provide Ms. Smith that hearing which it was already required to provide pursuant to 42 U.S.C. §503(a). [Brief App. 1c-2c]. This remedy, of course, does not interfere in any way with the administration of federal employment and yet it adequately protects an unemployed worker's right to have a fair determination of his eligibility for unemployment compensation.

II.

THE DENIAL OF AN UNEMPLOYMENT COMPENSATION FAIR HEARING TO THE APPELLANTS VIOLATES THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. Appellants Do Not Allege an Interest in Continued Employment

In support of their contention that the appellants lack an interest sufficient to invoke due process protection, the appellees' erroneously characterize the appellants' due process interest as one of continued employment rather than one of entitlement to unemployment compensation. [Br. 18-19]. As previously noted, pp. 2-3, *supra*, this mischaracterization is directly contrary to the facts of the instant case. Since the appellants' interest in *unemployment compensation* is plainly sufficient to

invoke the protections of due process [see Brief for Appellants, 20-22], the appellees' argument simply is not addressed to the due process issue in this case.

B. Appellants' Property Interest of Entitlement to Unemployment Compensation Is Not Affected by the Procedures at Issue in This Case

Appellee's next argument is based upon reasoning similar to that which was recently rejected by this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). Quoting from *Perry*, however, they argue that the scope of a property interest within the meaning of the due process clause may depend upon the "rules or understandings" which create the interest, 408 U.S. at 602, and therefore that the procedural deficiency of the law which created the interest is part of the substantive definition of the interest itself. [Br. 19-20]. In short, appellees argue that where the law fails to provide for due process, it necessarily creates a property interest to which due process does not apply.[5] The obvious error in the

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[5] In support of this argument, the appellees rely heavily upon *Dismuke v. United States*, 297 U.S. 167 (1936). Their reliance is wholly misplaced, however, since *Dismuke* was not a due process case, but rather it was a case of statutory interpretation in which this Court allowed judicial review of administrative determinations. Additionally, in reaching its decision, the Court did note the general requirement of [due process] fundamental fairness in administrative determinations:

> "If [the administrative officer] is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricous or unsupported by evidence; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized.

appellees' reasoning is that the very nature of procedural due process is to protect against the procedural deprivation of substantive property interests. Indeed, the appellees' circular argument is directly contrary to the numerous due process decisions of this Court which have corrected the due process procedural deficiencies of the very laws which created the property interests. See, *e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

C. The Federal Appellees' *Ex Parte* Procedures Do Not Satisfy Due Process

The appellees' finally contend that their *ex parte* procedures meet the requirements of due process [Br. 21-22]. Just as this argument is made without supporting authority, there is no supporting authority. It is beyond doubt that due process at the very least requires a "fair hearing on the fundamental facts." *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 199 (1933). As matters now stand, however, not only is there no hearing, but there is no opportunity for confrontation or cross-examination, no requirement that a decision be based upon the evidence, and no requirement for an impartial decision-maker. Compare the due process requirements set forth in *Goldberg v. Kelly*, 397 U.S. 254, 267-271 (1970).

In fact, there are no requirements of any kind concerning the procedures used by the appellees for ascertaining the reasons for separation which are sub-

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But the power of an administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled." 297 U.S. at 172 (citations omitted).

sequently submitted to state unemployment compensation agencies. All that is clear from the federal determinations is that they are *ex parte* determinations. As stated by the appellees:

> "[U]nlike an independent fact-finding tribunal such as a state unemployment compensation agency, the federal employing agency is reporting facts of which it has direct knowledge."
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> * * * * *
>
> "The federal agency knows the reasons for its action, and in order to state them it need only to consult its own records." [Br. 10].

Interestingly, the *ex parte* procedure urged by the appellees is nearly identical to that procedure held to be constitutionally insufficient in *Goldberg v. Kelly*, 397 U.S. 254, 258 (1970). Unquestionably it is a denial of due process to engage in such a "secret, one-sided determination of facts" decisive of rights, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion of Frankfurter, J.). An agency's consultation with its records can be nothing more.[6]

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[6] The appellees also contend that the appellants cannot complain about the constitutional inadequacy of the federal appellees' *ex parte* procedure since they did not utilize the *ex parte* corrective procedure. [Br. 23]. Such an allegation is wholly without merit where, as here, the adequacy of the administrative procedure is the very issue to be resolved. *Gibson v. Berryhill*, 411 U.S. 564, 574, 575 (1973).

III.

THE DENIAL OF AN UNEMPLOYMENT COMPENSATION FAIR HEARING TO THE APPELLANTS DENIES THEM EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. There are No Differences, Relevant to Unemployment Compensation, Between Non-Federal Employees and Federal Employees To Support the Appellees' Denial of an Unemployment Compensation Hearing to the Appellants

Reaching for a rationale for their distinction between non-federal employees and the appellants, for purposes of unemployment compensation, the appellees first contend that the Social Security Act coverage of private and state employees is so different from its coverage of federal employees that no federal employees are entitled to any unemployment compensation hearing whatsoever. [Br. 24-25]. While it is undisputed that federal employees were not covered by unemployment compensation until 1954,[7] it is equally obvious, as a result of the 1954 amendments, that unemployment compensation for all covered employees (whether private, state or federal) is identical in all respects but one. For all covered employees in the United States, unemployment compensation is administered by the states;[8] the state administrative costs are paid by the federal government;[9] and the

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[7] 5 U.S.C. §§8501-8508, formerly Title XV of the Social Security Act, §§1501-1510, 68 Stat. 1130 (1954).

[8] 42 U.S.C. §§501-503, 26 U.S.C. §3304; 5 U.S.C. §§8502, 8505(h).

[9] 42 U.S.C. §§502-503, 1101(c), 26 U.S.C. §3304, 5 U.S.C. §8505.

compensation earned by unemployed workers is paid by their former employers.[10] The only difference between the unemployment coverage of non-federal employees and of federal employees is that the appellees deny unemployment compensation fair hearings to certain former federal employees.[11]

Despite this otherwise identical treatment of non-federal employees and federal employees, the appellees contend that a federal agency, unlike all other employers, need not submit its reasons for termination to "an independent fact-finding tribunal" since the federal agency "is reporting facts known to its officials or with which they have at least some acquaintance." [Br. 24, 25]. This contention, however, provides no grounds for distinction between a federal employer and any other employer. Indeed, the appellees' contention would best apply, if at all, to the smallest private employers who are most intimately familiar with their reasons for dismissal. In any event, the appellees' contention does not justify

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[10]26 U.S.C. §§3301-3309; 5 U.S.C. §8505. The appellees' statement that for non-federal employees "the compensation payments themselves are funded by the states" [Br. 24], is in error. *Id.*

[11]The discriminatory impact of the appellees' denial of unemployment compensation hearings to probationary employees, and of the appellees' requirement that the federal reasons for termination be treated as final and conclusive, is reflected by the extraordinarily high percentage of UCFE claims which are denied for other than monetary (employee earnings) reasons. In the year 1971, 64.7% of all UCFE claims in New York State were so denied. [A. 48]. In comparison, only 13% of all non-federal claims for unemployment compensation in New York State were so denied during that same year. New York State Department of Labor, *Operations*, Vol. 33, No. 12, Table 13-B (December 1971). The cause of this disparity is self-evident.

their distinction since they extend fair hearings to permanent federal employees,[12] and to federal employees who resign.[13]

B. There Are No Differences, Relevant to Unemployment Compensation, Between Permanent Employees and Probationary Employees To Support the Appellees' Denial of an Unemployment Compensation Hearing to the Appellants

To create grounds for their distinction between permanent employees and probationary employees, for purposes of unemployment compensation, the appellees first contend that the termination hearings provided to permanent employees have "little dircet relationship" to eligibility for unemployment compensation. [Br. 26]. While this initially may have been true,[14] current practice is to the contrary. The appellees' internal procedures specifically prohibit state unemployment compensation agencies from denying compensation to permanent federal employees whose federal hearings are pending; they also require the transmission of the findings (made after the federal hearings) to the state agencies. United States Department of Labor, Employment Security Manual §6663C.

The appellees next contend that their distinction between permanent employees and probationary employees for purposes of unemployment compensation is grounded in the historic tenure distinctions between the two groups. [Br. 27-28]. While the appellants concede these tenure distinctions for purposes of employment, it

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[12] 5 C.F.R. §§752.201 *et seq.*, 771.101 *et seq.*, 772.301 *et seq.*

[13] 20 C.F.R. §609.18(a).

[14] See pp. 16-17 *infra*.

is apparent that the appellees' proferred rationale does not have a "fair and substantial relation to the object of the[unemployment compensation] legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971) [quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)]. In fact, it is contrary to those objectives,[15] for, as conceded by the appellees, "Congress was concerned with the status of probationary employees, who were particularly susceptible to discharge and therefore peculiarly in need of unemployment protection." [Br. 13]. The appellees, however, have provided that unemployment protection only to permanent employees, not to probationary employees.

C. The Considerations Which Necessitate the Provision of an Unemployment Compensation Hearing to Federal Employees Who Resign Also Necessitate an Unemployment Compensation Hearing for Federal Employees Whose Employment Was Otherwise Terminated

Although the appellees concede that the provision of federal or state unemployment compensation hearings to federal employees who resign (including probationary employees) was compelled by *Smith v. District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), they now contend that such a hearing is "necessary to provide the agency with sufficient information to make findings." [Br. 28]. The right to an unemployment compensation hearing, however, is not for the benefit of the employer, but "for all individuals whose claims for unemployment compensation are

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[15] See Brief for Appellants, 33-40, 42-51.

denied." 42 U.S.C. §503(a)(3). Yet the appellees' allegation does constitute an interesting concession: if an employer, instead of accepting an unemployed worker's reasons for resignation, needs a hearing to make a *finding* as to those reasons, so too does the unemployed worker need a fair hearing in order to have the reasons for termination fairly determined.

The appellees' failure to provide an adequate *ex post facto* rationale here is not altogether unexpected, however, in view of their failure to comply with the Court of Appeals' holding in *Smith*: "*No finding* by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing before an impartial tribunal." *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 438 (D.C. Cir. 1970) (emphasis added).

IV.

THE DENIAL OF AN UNEMPLOYMENT COMPENSATION FAIR HEARING TO THE APPELLANTS VIOLATES 42 U.S.C. §503(a) AND 5 U.S.C. §§8501-8508

A. Congress Required the Provision of Unemployment Compensation Hearings to All Covered Employees

The appellees do not contend that 5 U.S.C. §8506(a) requires the denial of an unemployment compensation hearing to the appellants; rather, they merely contend "that the Secretary [of Labor] has been granted authority to select the factfinding process–either including or excluding an adversary hearing– which in his view would best accord with the interests of claimants in expeditious but fair processing." [Br. 13]. Rather

inconsistently, they also argue that "[t]here is nothing in the legislative history . . . even suggesting the intention to require a hearing." [Br. 15].

The appellees, however, have conveniently overlooked the fact that "[w]e are after all dealing with a subject, unemployment compensation, in which the opportunity for hearing was considered by Congress to be so fundamental that it was expressly mandated on the State agencies that they provide 'opportunity for a fair hearing, before an impartial tribunal' for all individuals whose claims are denied."[16] When unemployment compensation was extended to federal employees,[17] "Congress assured a fair hearing to Federal employees governed by §8502 (for their claims are considered by the State agency which is under a general mandate to provide fair hearings for private employees), and to Federal employees governed by §8503 . . . . These provisions must be taken into account in considering the intention of that language of §8506 which states that the *findings* of Federal agencies shall be final and conclusive."[18]

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[16] *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 437-438 (D.C. Cir. 1970) (citation omitted).

[17] It must be remembered that Congress extended compensation to federal employees in order to end "the discrimination that has been practiced by the Federal government against its Federal civilian employees" and to "assure all of our citizens that they will be *equally* covered should they be so unfortunate as to become unemployed." 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer). As conceded by the appellees: "In considering the Act, Congress was concerned with the status of probationary employees, who were particularly susceptible to discharge and therefore peculiarly in need of enemployment protection." [Br. 13].

[18] *Smith v. District Unemployment Compensation Board*, 435 F.2d at 438. (Emphasis added.)

Also contradictory to the appellees' argument is Congress' use of the term *findings*—for "Congress had generally in mind that there are extensive provisions for hearing before the Civil Service Commission in the case of Federal employees who are discharged."[19] Indeed, "[t]he great majority of federal employees are, of course, those in the permanent category. The prototypical civil servant, the one we are likely to envision when thinking in the global concepts of legislators, is in this group. Given that reality, and given the familiar procedures governing the separation of permanent civil servants, it is reasonable to infer that the 'findings' declared 'final and conclusive' were conceived as those affecting, and resulting from procedures affecting, permanent civil servants."[20]

B. The Federal Appellees Have Failed To Provide a Fact-Finding Process for Purposes of Unemployment Compensation

As noted, the appellees argue "that the Secretary has been granted authority to select the fact-finding process—either including or excluding an adversary hearing—which in his view would best accord with the interests of claimants in expeditious but fair processing." [Br. 13]. Although the appellees apparently rely upon that part of 5 U.S.C. §8506(a) which states that the "employing agency shall make findings in the form and manner proscribed by regulations of the Secretary,"[21] it

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[19] *Id.*

[20] Dissenting Opinion of Judge Frankel [A. 74].

[21] General rule-making authority was delegated to the Secretary pursuant to 5 U.S.C. §8508.

is difficult to understand the thrust of the appellees' argument. Even assuming, *arguendo*, the specific delegation of such unlimited discretion, the Secretary has altogether failed to prescribe any fact-finding process for the purposes of unemployment compensation. Examination of the regulations promulgated by the Secretary reveals only a description of the *forms* to be used by the employing agencies to transmit their reasons, not the *form* and *manner* in which findings are to be made. See 20 C.F.R. §609.6.[22] Candidly, the appellees concede this failure by stating that the Secretary's purported fact-finding process constitutes no more than "merely a statement of the agency's reasons for discharging the employee" [Br. 17], and that "[t]he federal agency knows the reasons for its action, and in order to state them it need only consult its own records." [Br. 10].

The appellees apparently seek to justify their failure to prescribe the form and manner of making unemployment compensation findings by relying upon a statement made by a witness before the House Committee on Ways and Means. The appellees urge that "it was understood that administration of the [1954] Act would not significantly

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[22] The Secretary's failure to prescribe a fact-finding process is not mitigated by his regulations providing for correction by the employing agency of errors and omissions. Like the earlier regulations, the corrective regulations do not prescribe any fact-finding procedure for making corrections. See 20 C.F.R. §§609.23, 609.7 and 609.9. In any event, the corrective regulations are required by statute in addition to regulations prescribing the form and manner of making the initial findings:

> "The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions." 5 U.S.C. §8506(a).

affect 'existing operating methods and procedures.' " [Br. 15]. Actually, the witness, quoting another source, stated that "the program will not . . . call for a complete overhauling of existing operating methods and procedures,"[23] thus at least implying a need for some new operating methods and proceudres. Even this suggestion, however, has been rejected by the appellees since they have failed to change *any* operating methods or procedures for purposes of unemployment compensation, other than those relating to employees who resign.

C. Where the Federal Appellees Fail To Provide Unemployment Compensation Hearings, the Federal Reasons for Termination Are Subject to Review by the States

If anything is undisputed in this case, it is the fact that the federal appellees object to their provision of unemployment compensation hearings to the appellants. Also undisputed, however, is the fact that the state appellees, acting as agents of the federal appellees in New York, 5 U.S.C. §8502(a), are required by 42 U.S.C. §503(a)(3) to provide "a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied," including individuals such as appellants Christian and Green. Aware that compliance with this statutory requirement provides a simple solution to the issue here, the appellees argue only that it would be "inappropriate" for the state, in determining eligibility for unemployment compensation,

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[23] Hearings on H.R. 6537, 6539, 7074, 8857 and 8585 before the House Committee on Ways and Means, 83rd Cong., 2nd Sess. 55.

to review in its fair hearing the "statement of the agency's reasons for discharging the employee."[24] [Br. 17]. In support of this contention, the appellees rely upon one witness' written testimony, submitted to the House Committee on Ways and Means, stating that federal "findings involve questions of federal employment and wages which require uniform application at the Federal level."[25] Although determinations as to length of employment and wages earned may be the subject of some uniformity, similar uniformity for determining the reasons for discharge is altogether unattainable in a system which allows a multitude of middle-level supervisors in a multitude of federal agencies and departments to fire probationary personnel, *ex parte* and without cause. Further curtailing any expression of uniformity is the disparate application of different state unemployment laws by the fifty states and the District of Columbia. Finally, of course, the appellees' claim for uniformity is particularly incongruous since they have rejected it themselves in favor of providing fair hearings to all but one limited group of former federal employees. Thus, rather than providing uniformity, the appellees have provided license to federal supervisors everywhere to deny unemployment compensation to their probationary employees—those whom the appellees anomalously concede to be "particularly susceptible to discharge and therefore peculiarly in need of unemployment protection." [Br. 13].

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[24] Contrary to the appellees' contention, one of the fundamental objectives of the unemployment compensation hearing is to provide an impartial examination of an employer's reasons for discharge. This statutory objective remains constant whether the employer is federal, state or private.

[25] Hearings, *supra* at 16.

If the federal appellees deem it *inappropriate* for the state to review the federal reasons for termination, then the federal appellees must provide an unemployment compensation fair hearing in the first instance. But, "if no such Federal hearing is provided, the Federal finding contradicting the [appellants'] reasons for [termination] shall be stricken. The [state] shall then grant [appellants] the fair hearing that would be available to any private employee, since it will no longer be constrained by any adverse Federal finding." *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 439 (D.C. Cir. 1970).

CONCLUSION

For the reasons stated herein the judgment of the three-judge court below should be reversed, and a judgment should be entered construing 42 U.S.C. §503(a) and 5 U.S.C. §§8501-8508 to require an opportunity for a fair hearing for purposes of unemployment compensation for all former federal probationary employees who did not resign, or a judgment should be entered holding 5 U.S.C. §8506(a), as interpreted by the appellees, to be unconstitutional.

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CHRISTIAN ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 72-5704. Argued November 13, 1973—Decided January 21, 1974

Appellants, former federal probationary employees who were denied benefits under the Unemployment Compensation for Federal Employees Program, brought this action in District Court seeking declaratory and injunctive relief against provisions of the Program and its implementing regulations that they contended operated to deny them a hearing on the factual basis for their removal from federal service, for the purpose of determining their eligibility under state law for unemployment compensation. They claimed that the Act requires such a hearing and, alternatively, that the denial of a hearing deprived them of due process and equal protection. A three-judge District Court held that the statute does not require a hearing to contest the employing agency's findings; dismissed the constitutional claims against the federal defendants for lack of subject-matter jurisdiction; and held that the state agency's denial of a hearing did not violate the Due Process or Equal Protection Clauses. *Held:* Any decision upon appellants' statutory or constitutional claims would be premature in view of the fact that the record does not disclose that the state agency, in notifying appellants of the adverse determinations, informed them, as it was required to do by the applicable regulation, of their "right to additional information or reconsideration and correction" of the findings by the employing agencies; or that appellants invoked the available procedure entitling them to request their agencies "to reconsider and correct" those findings. The District Court's dismissal of the suit as to both federal and state defendants is therefore vacated with directions that the court determine whether appellants should be permitted to invoke the applicable administrative procedures. Pp. 618–624.

347 F. Supp. 1158, vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

E. Richard Larson argued the cause for appellants. With him on the briefs were *Dennis R. Yeager* and *Robert P. Roberts.*

Mark L. Evans argued the cause for appellees. On the brief for the federal appellees were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Keith A. Jones,* and *Kathryn H. Baldwin. Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, filed a brief for appellees New York State Department of Labor et al.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellants, discharged federal probationary employees, were denied unemployment compensation by the New York State Department of Labor, an "agent of the United States" under agreement with the Secretary of Labor for the administration of the Unemployment Compensation for Federal Employees (UCFE) Program, 5 U. S. C. § 8501 *et seq.* Appellants brought this class suit against that state agency in the District Court for the Southern District of New York, joining as defendants the United States Department of Labor, which is charged with overall responsibility for the program, and the United States Post Office Department and Department of the Treasury, which are appellants' former employing agencies.

Appellants alleged that the state agency had based its adverse determinations on findings of fact made *ex parte* by the federal employing agencies, and that the state agency had refused to afford either appellant a hear-

**Mozart G. Ratner, George B. Driesen, Leo M. Pellerzi,* and *George Kaufmann* filed a brief for the National Association of Letter Carriers AFL–CIO et al. as *amici curiae* urging reversal.

ing at which he could attempt to contest those federal findings. The result, appellants claimed, was a deprivation of any opportunity to be heard, in violation of the UCFE statutes and of the Fifth and Fourteenth Amendments. They sought certification as representatives of the class of persons similarly situated, the convening of a three-judge court, and declaratory, injunctive, and mandamus relief.

The District Court viewed the suit as a constitutional attack on 5 U. S. C. § 8506 (a),[1] which, *inter alia*, makes the findings of the federal employing agency "final and conclusive" on the state agency, and on the regulations of the Secretary of Labor promulgated, pursuant to 5 U. S. C. § 8508, to enforce the program.[2] A three-judge

[1] That subsection provides:

"(a) Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

"(1) whether or not the Federal employee has performed Federal service;

"(2) the periods of Federal service;

"(3) the amount of Federal wages; and

"(4) the reasons for termination of Federal service.

"The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502 (d) and 8503 (c) of this title. This subsection does not apply with respect to Federal service and Federal wages covered by subchapter II of this chapter."

[2] The pertinent sections of 20 CFR appear in the Appendix attached to this opinion.

court was convened. That court, in an opinion reported at 347 F. Supp. 1158 (1972), first examined the statutory claim and held that § 8506 (a) does not require that appellants receive either a state or a federal hearing to contest the employing agency's findings. Next, the court noted that jurisdiction over the claims against the federal defendants had been alleged only under 28 U. S. C. § 1361, providing for mandamus actions. Holding that § 1361 will not support a constitutional challenge to a statute, the court dismissed the constitutional claims against the federal defendants for lack of subject-matter jurisdiction.[3] Finally, turning to the constitutional claims against the state defendants, the court, apparently assuming for purposes of argument that the federal defendants were not constitutionally required to afford appellants a hearing, treated the claims as asserting that

[3] The District Court stated no reasons to support this holding. Appellants attack it, arguing that mandamus jurisdiction lies where the act of a federal official, although authorized by statute, is alleged to violate the Constitution, citing *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908). Alternatively, they contend that jurisdiction over the federal defendants lies under 28 U. S. C. § 1343 (3) so long as there has been joint participation by state and federal officers under color of state law, see *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). At oral argument the Assistant to the Solicitor General stated: "[W]e do not contest jurisdiction under [the] mandamus statute." Tr. of Oral Arg. 26. See also Brief for Federal Appellee 6 n. 2.

We have no occasion to address appellants' contentions that the District Court has jurisdiction to hear the constitutional claims against the federal defendants. There is jurisdiction of the federal defendants in any event for purposes of consideration of the appellants' statutory claim that the Secretary has disobeyed a nondiscretionary command in § 8506 that he provide for a full hearing. See *infra*, at 621–622. Our remand directs that the District Court reconsider that claim as related to the availability under the Secretary's regulations of a right of reconsideration and correction of the findings of the employing agencies.

denial of a state hearing was, in effect, a denial of any hearing on the federal findings. The court held that the denial of a hearing by the state agency did not violate either the Due Process or the Equal Protection Clause.

We noted probable jurisdiction of appellants' appeal, 411 U. S. 930 (1973). We are of the view that decision upon appellants' statutory and constitutional claims would be premature. We cannot discover in the record that the state agency, in notifying appellants of the adverse determinations, informed them, as required by 20 CFR § 609.20, of their "right to additional information or reconsideration and correction" of the findings by the employing agencies. Nor can we discover from the record whether or not appellants invoked 20 CFR § 609.23, entitling them to request their employing agencies "to reconsider and correct" those findings.

The "findings" of appellant Christian's federal employer, the United States Post Office Department, were that Christian was discharged because of excessive absences. The "findings" of appellant Green's employer, the Department of the Treasury, were that Green was discharged for consuming an alcoholic beverage within 24 hours of going on duty as a sky marshal. It is clear that neither was afforded a prior hearing by his agency or any opportunity to challenge the justifications for his discharge.[4] Each then applied for unemployment compensation through the New York State Department of Labor. As required by § 8506, New York requested and obtained

[4] Appellant Green unsuccessfully sought review of the factual basis for his discharge by the Civil Service Commission under 5 CFR § 315.806. But, as provided by that regulation, a probationary federal employee has no right to appeal a discharge, and is only entitled to a hearing on the basis of claims that the discharge resulted from discrimination based on race, color, religion, sex, political persuasion, marital status, or physical handicap, or that the procedure used violated 5 CFR § 315.805.

from each agency its "findings" describing the nature of the employment, including the reasons for the discharge. On the basis of those findings, the state officials made an initial determination that neither appellant qualified for compensation under the applicable state standards.[5]

We find nothing whatever in the record to show compliance by the state agency with 20 CFR § 609.20. All that appears is that the New York officials sent each appellant a letter that included (a) a recitation that no employment benefits could be paid, (b) the state rule that required that conclusion, (c) a short summary of the findings of the federal agency, and (d) a statement that the individual could request a hearing before an impartial state referee. Indeed, the letter appears to be a form letter appropriate in cases of private and state employee applicants, but not tailored for the situation of the federal employee applicant given rights of reconsideration and correction by the Secretary's regulations.

Appellant Christian requested and obtained a hearing

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[5] Section 8502, 5 U. S. C., provides in part:

"(b) The agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State if his Federal service and Federal wages assigned under section 8504 of this title to the State had been included as employment and wages under that State law.

. . . . .

"(d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent."

See 20 CFR § 609.14; N. Y. Labor Law § 500 *et seq.* (1965). Both appellants were denied compensation on the basis of § 593, which includes as grounds for denial "voluntary separation without good cause" and "misconduct in connection with his employment."

before a state referee. The referee permitted her to introduce evidence to rebut the federal findings, credited that evidence, and recommended that she be provided unemployment compensation. The state Appeals Board, however, reversed on the ground that § 8506 prohibited re-examination of the facts found by the federal agency. Appellant Green had not obtained a hearing at the time this suit was filed, and the record does not disclose whether he requested one.[6]

The UCFE Program does not, as the state Appeals Board recognized, contemplate a hearing before the state agency for correction of factual findings of the federal employer. But, while prohibiting state re-examination of the facts, § 8506 (a) also requires an opportunity for federal re-examination:

> "The regulations [promulgated by the Secretary of Labor] shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of [state adjudication]."

The regulations promulgated by the Secretary of Labor plainly attach great significance to the right of the discharged employee to have the employing agency reconsider its stated reasons for his discharge. The crucial requirement that triggers this reconsideration is the obligation imposed upon the state agency to notify the applicant of the content of the federal findings, which notice "shall [also] inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings." 20 CFR § 609.20. Thereupon, the employee may obtain additional information from the employing agency concerning the basis

[6] Both appellants were entitled to a hearing, N. Y. Labor Law § 620, review by the Appeals Board, *id.*, § 621, and state judicial review on questions of law, *id.*, § 624.

of its findings, 20 CFR § 609.22. Whether or not he avails himself of that opportunity, he may file a request for reconsideration and correction, "together with such information as supports his request, through the State agency before which the claim is pending . . . ." 20 CFR § 609.23. Upon receipt of such a request, the federal agency must consider any information submitted by the employee, promptly correct any errors or omissions, and either affirm, modify, or reverse its original findings in writing. 20 CFR § 609.9. Finally, the State is required to stay its adjudicatory process pending federal reconsideration, although it is conclusively bound by any factual findings of the federal agency, 20 CFR §§ 609.23 (a), 609.18 (c), when it applies its own law to redetermine eligibility. 20 CFR §§ 609.24 (c), (d).

Appellants' contention that § 8506 (a) works a denial of due process and equal protection by depriving them of a hearing before the state agency is thus misdirected. Congress has precluded a hearing on the federal findings in any state forum, but it has required the Secretary of Labor to provide a "hearing" of some dimensions in conjunction with the mandated procedures for reconsideration. Whether a more comprehensive hearing than §§ 609.22–609.24 of the regulations now provide is required either by the language of § 8506 (a) or by the Constitution—and we intimate no views on those questions—the regulations of the Department of Labor, as implemented by the federal agencies subject to those regulations, should be the focal point of the inquiry.[7]

[7] We note that an employee who resigns must, pursuant to 20 CFR § 609.18, be "afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation," if the federal findings are to be final and conclusive. The Solicitor General argues that there are sound reasons for limiting such opportunities to resignees since the agency "will have no information

The absence of any indication in the record that this federal administrative procedure was followed is, in our view, a bar to our consideration of appellants' attack upon the validity of the regulations. It is true that the fact that the employing agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedure used to reach that determination. See *Cole* v. *Young*, 351 U. S. 536 (1956); L. Jaffe, Judicial Control of Administrative Action 371–372 (1965). But there are sound practical reasons for declining such review where the agency has not had the opportunity to apply its challenged procedure to a determination that is clearly within its subject-matter jurisdiction.

The most obvious reasons relate to economy. A favorable agency decision on the merits of the claim may moot the objections to the procedure employed. And "it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages," *McKart* v. *United States*, 395 U. S. 185, 194 (1969).

But there are also persuasive reasons more directly related to the presentation of the procedural claim, as we have noted in cases involving the analogous requirement that administrative remedies be exhausted prior to application for judicial review of the merits. See *McGee* v. *United States*, 402 U. S. 479 (1971); *Rosado* v. *Wyman*, 397 U. S. 397, 406–407 (1970). Appellants' criticism, on this appeal, of the federal administrative remedy as an *"ex parte"* determination amply demonstrates the point. The regulations clearly require that the agency

concerning [their] reasons." Brief for Federal Appellees 28. At this stage of the litigation, however, we have no way of knowing what protections this procedure includes, how it differs from the procedures available to discharged employees, or what kinds of "resignations" it will cover.

receive and consider any additional information the employee submits. Thus, the question is not whether there is to be some form of adversary proceeding, but whether that proceeding must be as elaborate as appellants contend.[8] That determination would be hazardous on the scant record before us. The regulations appear capable of accommodating various kinds of issues, and their requirements should be construed with an eye to the nature of the agencies involved and the employment relationship. We cannot know at this stage what particular procedures will be applied, whether credibility determinations will arise, how they will be treated if they do, or even what official within a federal employing agency will be responsible for the reconsideration. Removal of these uncertainties from the case may significantly advance judicial resolution of appellants' claims, while occasioning no great cost to them.[9]

But we cannot determine on this record whether the District Court would have dismissed this suit for failure to invoke the federal administrative procedures. The adverse notification provided by New York clearly fails to satisfy the notice requirement of 20 CFR § 609.20 of the Secretary's regulations. Without that crucial information concerning their rights, appellants could hardly be found to have waived them by proceeding in the state forum.[10] Yet the record is silent concerning whether

[8] "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).

See *Morrissey* v. *Brewer*, 408 U. S. 471 (1972); *Bell* v. *Burson*, 402 U. S. 535 (1971).

[9] Cf. *McKart* v. *United States*, 395 U. S. 185, 196–197 (1969).

[10] At oral argument the Assistant to the Solicitor General suggested that appellants might now be barred from obtaining reconsideration

such information was provided, either with the state notice or otherwise. Under the circumstances, we vacate the District Court's dismissal of the suit as to both federal and state defendants and remand to the District Court with directions to determine whether appellants should be permitted to invoke the federal procedures. In such case, the suit should be retained on the docket for final decision following the federal redetermination proceedings.

So ordered.

APPENDIX TO OPINION OF THE COURT

Code of Federal Regulations
Title 20: Employees' Benefits
Part 609—Unemployment Compensation for Federal Civilian Employees

§ 609.1 Definitions.

. . . . . .

(b) "Federal agency" means any department, agency, or governmental body of the United States, including

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and correction of the findings by the passage of time. We find no such limitation in the regulations. Indeed, the only time limitation imposed with regard to corrections is to be found in 20 CFR § 609.7, which requires the federal employing agency to "promptly correct its error" if it ascertains within one year of its initial submission of findings to the State that "any of its Federal findings were erroneous." That this is an independent obligation, imposed on the agency without regard to the receipt of a request for reconsideration by the employee, is clear both from the language of the regulation and from the fact that all other time limits imposed by the regulations are designed to protect the employee from delay by the agency. See, *e. g.*, 20 CFR §§ 609.6, 609.19 (b). Compare *id.*, § 609.24 (a), with *id.*, § 609.24 (d). Moreover, a construction of the regulation as barring reconsideration and correction despite the State's failure to provide the notice required by the regulations might raise independent constitutional problems.

any instrumentality wholly or partially owned by the United States, employing individuals in Federal civilian service.

. . . . .

(f) "Federal findings" means the facts found by a Federal agency as to (1) whether an individual has performed Federal civilian service for such agency during the base period specified on a Form ES–931; (2) the period or periods of such Federal civilian service; (3) the individual's Federal civilian wages for the base period specified on such form; and (4) the reasons for termination of his Federal civilian service.

. . . . .

§ 609.6 Federal findings on Form ES–931.

(a) Within 4 work days after receipt from a State agency or the Secretary of a Form ES–931 a Federal agency shall make its Federal findings, complete all copies of the form, and transmit its Federal findings to the State agency or the Secretary, as appropriate, on such form or as a part thereof. If documents necessary for completion of a Form ES–931 have been assigned to an agency records center or the Federal Records Center in St. Louis the Federal agency shall obtain the necessary information from the records center. Any records center shall give priority to such request.

(b) If a completed Form ES–931 cannot be returned within 4 work days of receipt the Federal agency immediately shall inform the State agency or the Secretary, as appropriate, and shall include an estimated date by which the completed form will be returned.

(c) Each Federal agency shall maintain a control of the Forms ES–931 received by it that will enable it to ascertain at any time the number of such forms that have not been returned to the requesting State agency

or the Secretary and the date of the Federal agency's receipt of such unreturned forms.

§ 609.7 Corrected Federal findings.

If a Federal agency ascertains at any time within 1 year after it has returned a completed Form ES–981 [*sic*] to a State agency or the Secretary that any of its Federal findings were erroneous it shall promptly correct its error and forward corrected Federal findings to the State agency or the Secretary, as appropriate.

§ 609.8 Answering requests for additional information.

On receipt of a request for additional information under § 609.22 a Federal agency except where it would be inconsistent with general policies followed in the case of separations for security reasons shall furnish in writing to the requesting authority such additional information as (1) will enable a Federal civilian employee to understand the basis for Federal findings or (2) will enable the requesting authority to correctly apply a State unemployment compensation law.

§ 609.9 Answering requests for correction of Federal findings.

On receipt of a request for reconsideration and correction of Federal findings under § 609.23 a Federal agency shall consider the information supplied in connection with such request and shall review its Federal findings. The Federal agency promptly shall correct any errors or omissions in its Federal findings and shall affirm, modify, or reverse any or all of its Federal findings in writing. The Federal agency then shall forward its reconsidered Federal findings to the requesting authority.

. . . . .

§ 609.18 Finality of Federal findings.

(a) Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U. S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23.

(b) Additional information submitted by a Federal agency under § 609.8 shall be considered part of the original Federal findings which, as so supplemented, shall be final and conclusive, as provided in paragraph (a) of this section.

(c) Federal findings which after reconsideration under § 609.9 have been affirmed, modified, or reversed by the Federal agency shall be final and conclusive, as provided in paragraph (a) of this section.

§ 609.19 Determination of entitlement.

(a) *Entitlement.* The State agency of a State whose unemployment compensation law applies to a Federal civilian employee under § 609.15 promptly shall determine such employee's entitlement to compensation and pay such compensation in the same amounts, on the same terms, and subject to the same conditions as would apply to such employee if his Federal civilian service and wages had been included as employment and wages under the State unemployment compensation law except that § 609.31 shall apply to the Virgin Islands agency in lieu of this paragraph.

(b) *Determination in absence of Form ES–931.* (1) If a Form ES–931 has not been received from a Federal agency by the 12th day after such form was forwarded to such agency, a State agency shall determine entitlement to compensation on the basis of a Federal civilian employee's statement under oath if in addition to furnishing such statement such employee submits for examination any document issued by a Federal agency (as for example Standard Form 50 or W–2) showing that he performed service for such agency.

(2) If a Form ES–931 received from a Federal agency after such determination contains Federal findings which would result in a change in the Federal civilian employee's entitlement to compensation the State agency promptly shall make a redetermination and give such employee notice thereof. All payments of compensation made after such redetermination shall be in accordance therewith and all payments of compensation made prior to such determination shall be adjusted in accordance therewith. If the Federal civilian employee has received compensation not in accordance with the redetermination § 609.21 shall apply.

§ 609.20 Notice of determination.

A notice of determination or redetermination shall be given to a Federal civilian employee with respect to any determination or redetermination under § 609.19 or § 609.31. Such notice shall be given in the same manner as notice of determination or redetermination is given to claimants under the State unemployment compensation law. The notice shall include the Federal findings and shall inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings. The State agency shall set forth the Federal findings in

sufficient detail to enable the Federal civilian employee to determine whether he wishes to request reconsideration or correction of any such findings.

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§ 609.22 Procedure for obtaining additional information.

(a) *Request by Federal civilian employee.* If a Federal civilian employee needs additional information in order to understand the basis for a Federal finding in connection with a claim for compensation under the UCFE program he may file a request through the State agency, or the Secretary if the State agency does not determine claims under the UCFE program, for more specific information from the Federal agency which made such Federal finding. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for additional information is filed, such employee must file concurrently with such request a timely appeal or request for redetermination under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency the additional information requested.

(b) *Request by State agency.* If at any stage of determining a Federal civilian employee's entitlement to compensation a State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary determines that Federal findings do not contain sufficient information to enable correct application of the State unemployment compensation law a request may be made for additional facts from the appropriate Federal agency.

§ 609.23 Procedure for obtaining correction of Federal findings.

(a) *Request by Federal civilian employee.* A Federal civilian employee who wishes a Federal agency to reconsider and correct Federal findings in connection with a claim for compensation under the UCFE program may file a request for such reconsideration and correction, together with such information as supports his request, through the State agency before which the claim is pending or through the Secretary if the State agency does not determine claims under the UCFE program. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for reconsideration and correction of Federal findings is filed, such employee must file concurrently with such request a timely appeal under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency its reconsidered Federal findings.

(b) *Request by State agency.* A State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary may request a Federal agency to reconsider and correct its Federal findings at any stage in determining a Federal civilian employee's entitlement to compensation.

§ 609.24 Procedure after correction of Federal findings.

(a) A State agency shall forward to the affected Federal civilian employee a copy of reconsidered Federal findings or additional information furnished by a Federal agency.

(b) If additional information or reconsidered Federal findings provide a basis under the State un-

employment compensation law for the State agency to redetermine such employee's entitlement to compensation the State agency promptly shall make a redetermination and give notice thereof to the affected Federal civilian employee.

(c) If a State agency after reviewing additional information or reconsidered Federal findings submitted by a Federal agency does not consider that there is a basis for making a redetermination the State agency promptly shall set a date for hearing the Federal civilian employee's appeal.

(d) If Federal findings are corrected under § 609.7 a State agency shall notify the affected Federal civilian employee of such correction. If the State unemployment compensation law permits and the corrected Federal findings afford a basis for such action the State agency shall redetermine such employee's entitlement to compensation and give notice of redetermination to such employee.

§ 609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under § 609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

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